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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF APPEALS

—OF—

WEST VIRGINIA.

AT THE SPRING-SPECIAL, SEPTEMBER AND FALL
SPECIAL TERMS, 1898, AND JANUARY TERM, 1899.

(April 16, 1898, to February 8, 1899.)

—BY—

EDGAR P. RUCKER,

ATTORNEY GENERAL AND EX-OFFICIO REPORTER.

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DURING THE TIME OF THESE REPORTS.

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JOHN W. ENGLISH.
MARMADUKE H. DENT.
HENRY C. McWHORTER.

ATTORNEY GENERAL AND EX-OFFICIO REPORTER,

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REPORTS OF DECISIONS
OF THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA.

SPRING-SPECIAL TERM, 1898.

CHARLESTON.

GEORGE *et al.* v. CURTIS *et al.*

Submitted February 2, 1898—Decided April 16, 1898.

EQUITY—Parties in *Pari Delicto*—Sheriff.

When a sheriff commits a default, and the sureties on his bond after paying his liabilities proceed against him by indictment for embezzlement, and afterwards an agreement is entered into between the sureties who paid off said liability and the father of said sheriff, who was also one of his sureties, that, if he will pay them a certain sum of money, said criminal proceedings shall be stopped, and said father be released from further liability to his co-sureties,—if such agreement is so far executed that the money is paid, and the *pro rata* share of said father on the liability of said surety is paid, and accepted by said co-sureties, in a chancery suit brought by said co-sureties against said father to make him contribute

further, under the circumstances of the case, equity will leave the parties where it finds them, and the plaintiff's bill will be dismissed. (p. 11.)

Appeal from Circuit Court, Brooke County.

Action by S. George and others against J. E. Curtis and others. From a judgment for plaintiffs, defendants appeal.

Reversed.

HUBBARD & HUBBARD, for appellants.

PALMER & PALMER, for appellees.

ENGLISH, JUDGE:

In November, 1888, Joseph L. Curtis was elected sheriff of Brooke County, and on December 20, 1888, he qualified and gave bond as such sheriff before the county court of said county. As required by law, he gave two bonds,—one in the penal sum of thirty thousand dollars, conditioned as required to faithfully discharge the duties of his office, and to account for and pay over all the money coming to his hands by virtue of his office; and the second of said bonds was in the penal sum of fifteen thousand dollars, conditioned as required to account for all money coming to his hands by virtue of said office in receiving, disbursing, and collecting all school money collected by him as sheriff. On both of said bonds John Gibson, Robert Scott, D. Brown, S. George, L. C. Applegate, Henry Zilliken, Lucas Walter, W. P. Cowans, W. A. Rodgers, F. C. Glass, Walter Cowans, and J. E. Curtis were sureties. In conducting said business of sheriff, said Joseph L. Curtis committed a default, and the county court of Brooke county, in the name of this State, brought suit against him and his securities on the first bond, and obtained judgment against the defendants for the sum of twenty-six thousand two hundred and fifty dollars and seventy-four cents, with interest from November 9, 1893, and costs amounting to one hundred and nine dollars and thirty-three cents. A suit in equity was brought in the circuit court of said county by S. George, W. P. Cowans, John Gibson, Robert Scott, Lucas Walters, and L. C.

Applegate against J. E. Curtis and others. The plaintiffs, among other things, allege that, before said judgment was obtained, said Joseph Curtis made a general assignment for the benefit of his creditors to S. George, and that, after said judgment was obtained, it was part paid out of the property in the hands of the assignee, and that all of the money in the hands of assignee was exhausted in payments made on said judgment, and the balance, amounting with interest and costs to twenty-one thousand, seven hundred and forty-seven dollars and eighty-four cents was paid by complainants as follows: eleven thousand dollars January 9, 1894, and ten thousand seven hundred and forty-seven dollars and eighty-four cents, May 31, 1894; the sum of three thousand one hundred and six dollars and eighty-three cents having been paid by each of the complainants. The plaintiffs further allege that the said Henry Zilliken, W. A. Rodgers, and J. E. Curtis were each sureties on Curtis' official bonds, and were liable with plaintiffs to pay the amount due thereon, but had paid no part of the liability, and should contribute their *pro rata* share on said judgment. They further allege that on April 26, 1880, John Erwin and wife conveyed by deed to J. E. Curtis a fraction of a lot of land in Wellsburg, Brooke County, W. Va., designated in said deed as a fraction of a lot opposite lot No. 14, which lot is still owned by J. E. Curtis; that on December 5, 1884, said Curtis executed a deed of trust to defendant J. L. Curtis, by which he conveyed said fraction of land in trust to secure the payment of a note of one thousand dollars and interest thereon to John Erwin now dead; and they charge that the large part of said note has been paid, and they pray that the administrators of said Erwin may answer and discover the amount now unpaid on the note secured by said trust deed.

Plaintiffs also allege that, during the entire term of said Curtis as sheriff of said county, said J. E. Curtis was his deputy, had charge of the books, made most of the collections, and handled most of the money that passed through the office, and was in every way familiar with the business of the office; that said J. E. Curtis is the father of said Joseph L. Curtis, and, by reason of his acquaintance with

the office affairs, he knew that said Joseph L. Curtis was largely behind in his accounts, and would be unable to meet the amounts due the county court, and to the other persons and corporations for which, as sheriff, he collected taxes; and taking advantage of the knowledge acquired as such deputy, said J. E. Curtis, as far as he could do so, disposed of his property, and conveyed it to other persons, with the fraudulent intent to escape all liability for the default and indebtedness of said Joseph L. Curtis, and to defraud the plaintiffs, who were jointly liable with him on said official bonds; that said Joseph L. and J. E. Curtis were joint owners of a printing office, presses, etc., known as the "Pan-Handle News," worth two thousand five hundred dollars, and, after they had discovered said Joseph L. would be unable to meet his liabilities to the county court and others, they conveyed all of the printing machinery, etc., to the defendant David H. Hahn, son-in law to said J. E. Curtis, for the purpose of defrauding and delaying the complainants and other creditors in the collection of their claims; that on September 5, 1893, J. E. Curtis was the owner of a lot of land in the town of Bethany, Brooke County, known on the plat of said town as "No. 30," and on that day he and his wife conveyed said lot to David H. Hahn, and the same day Hahn conveyed it to Sarah B. Curtis, wife of said J. E. Curtis, conveyances voluntary and without consideration, and made with intent to defraud creditors, particularly the plaintiffs; that said J. E. Curtis was then largely indebted, and his liability on said official bond then existed; and, with like intent, he sold land in Wellsburg, and purchased other land in Lazierville, W. Va., from one John McClure, paid for it and deeded the same to his wife, so it might not be liable for his debts; also, that J. E. Curtis was on June 5, 1894, the owner of certain judgments obtained by him in the circuit court, - one dated October, 1890, for one thousand one hundred and ten dollars and eighty-four cents, with interest, etc., another for one hundred and ninety-five dollars and twenty cents, same date with interest, and another same date, for eight hundred and seventy-one dollars and ninety-eight cents, interest, etc., - and with like intent J. E. Curtis assigned said judgments

to W. K. Curtis, another of his sons; that said J. E. Curtis is the owner in fee of two-thirds of lot 13 in town of Bethany, one-fourth of lot 65 and lot 18 in said town; that said J. E. Curtis is the owner of real estate outside of this State; that he owns a large amount of real estate, notes, bills, and other assets, the amount of which is unknown to plaintiffs: and they ask that J. E. Curtis be required to make full discovery of all his property, where located, the nature and value thereof. Plaintiffs also allege that Henry Zilliken is the owner of a certain lot of land in Wellsburg, described as the fraction of a lot opposite lot No. 20, which was conveyed to him by J. C. Palmer, special commissioner, April 7, 1886, and on April 7th, same year, Zilliken conveyed said lot to J. C. Palmer, in trust to secure to S. George the payment of two several notes, each for seven hundred and forty-three dollars and twelve cents, and another note for twenty-five dollars; and on April 28, 1883, said Zilliken conveyed or attempted to convey said fraction of lot to Edward O. Hunter, in trust to secure to James Hunter the payment of a note for one thousand dollars and interest; that though said last-named deed was executed on April 28, 1883 it was not admitted to record until June 20, 1886; that on March 18, 1893 Zilliken and wife conveyed said fraction of lot in Wellsburg to A. H. Moeser, and, as part of same deed, conveyed to said Moeser all of his stock of goods, jewelry, furniture, etc., being all the property owned by said Zilliken, to secure the payment of a note to William F. Hofman for one thousand six hundred and ninety-four dollars and seventy-two cents and interest, and also a note of Heeren Bros. for six hundred dollars and interest; that said deed of April 28, 1883, to Edward O. Hunter was given to secure a debt long since paid; that said deed of March 18, 1893, conveyed all of Zilliken's property, both real and personal and that, at the time of giving the same, he was insolvent, and the deed was made with the purpose of covering up his property, so the same could not be made liable for his debts, and to hinder, delay, and defraud his creditors; that said debts are not *bona fide* and, even if they were, he attempted to give a preference to his creditors; and that said goods, jewelry, etc., conveyed to Moeser, were not

taken by him, but remained in possession of Zilliken, who continued to sell same, and appropriate the proceeds, and thus to hinder, delay, and defraud his creditors. Plaintiffs further say that said W. A. Rodgers, is possessed of a large amount of property, consisting of notes and bills due said Rodgers; but they cannot say where said property is, and they ask that Rodgers be compelled to discover and make known all of the property he holds, or which is held for him by others. Plaintiffs further say that S. George obtained a judgment against J. E. Curtis on May 31, 1894, for one hundred and ninety-three dollars and ten cents, which was docketed on the lien docket of said county June 4, 1894; wherefore the plaintiffs say that said deeds of trust made by Zilliken to Edward O. Hunter and A. H. Moeser are fraudulent and void as against the plaintiffs' claims, and should be set aside, and the property therein conveyed subjected to plaintiffs' claims; that the several deeds and transfers made by said J. E. Curtis to his wife, or taken in her name, and to his son-in-law Hahn, and to others, which are charged to be fraudulent, should be set aside and annulled, and the property subjected to the claims of plaintiffs.

The defendants J. E. Curtis and Henry Zilliken filed their separate answers to the amended bill, as did also William Rodgers; and Otto Heeren and William F. Hofman, partners of the firm of Heeren Bros., and William Hofman in his own right, filed their joint answer to said amended bill; and Hannah M. Hunter, administratrix of James Hunter, also filed an answer to the amended bill,—which answers put in issue the material allegations as to said defendants, and were replied to generally by the plaintiffs. Sarah B. Curtis also filed her answer to plaintiffs' bill, adopting the answer of J. E. Curtis. Depositions were taken by both plaintiffs and defendants, and the cause finally heard on March 21, 1896, and a decree rendered therein holding that J. E. Curtis, William A. Rodgers, and Henry Zilliken are liable to the plaintiffs for their *pro rata* share of the amount paid by the plaintiffs on the judgment obtained in the name of the State of West Virginia, for the use of the county court of Brooke County, against said sureties in said sheriff's bond, rendered No-

vember 9, 1893, for the sum of twenty six thousand two hundred any fifty dollars and seventy-four cents and interest from said day. And the court being of opinion that the sale and transfer of the printing office, presses, etc., known as the "Pan-Handle News," located at Wellsburg, W. Va., by Joseph L. Curtis and J. E. Curtis, was fraudulent, and made with intent to defraud creditors; that said conveyances made by J. E. Curtis and Sarah B. Curtis to D. H. Hahn, and by said Hahn to Sarah B. Curtis, of said lot No. 30, in the town of Bethany, were fraudulent, and made with intent to delay, hinder, and defraud creditors; that the property conveyed by John McClure and wife to Sarah B. Curtis, so far as the same was paid for, was paid out of the funds of J. E. Curtis; and that the land so conveyed is subject to the claims of the plaintiffs in this suit; and that the transfer of the judgments hereinbefore set out as owned by J. E. Curtis, and transferred to W. K. Curtis, was made to defraud the creditors of J. E. Curtis,—proceeded to decree in favor of the plaintiffs against J. E. Curtis for two thousand seven hundred and eighteen dollars and forty-eight cents, with interest from May 31, 1894, which should be reduced one-eighth of all received by or on account of plaintiffs from the defendants Zilliken and William A. Rodgers or either; and it was further decreed that plaintiffs do recover of defendant Zilliken the sum of two thousand seven hundred and eighteen dollars and forty-eight cents, with interest thereon from May 31, 1894, which sum should be reduced one-eighth of all received by or on account of the plaintiffs from defendants J. E. Curtis and William A. Rodgers, and that plaintiffs do recover of William A. Rodgers the sum of two thousand seven hundred and eighteen dollars and forty-eight cents, with interest from May 31, 1894, which should be reduced one-eighth of all received by plaintiffs from the defendants J. E. Curtis and Henry Zilliken, or either of them; and it was further decreed that the property before described as the Pan-Handle News property, the several judgments of J. E. Curtis against Albert Lynn and James P. Rodgers, the said lot No. 30 in Bethany, and the tract of land in Lazierville conveyed to Sarah B. Curtis by John McClure and wife, be subjected and made liable to

claim of the plaintiffs for the amount recovered against J. E. Curtis in this decree; that the several deeds of trust made by Zilliken and wife on April 28, 1883, to Edward O. Hunter, and on March 18, 1893, to A. H. Moeser, trustee, are valid and subsisting liens on the property therein set forth. And said cause was referred to a commissioner, to ascertain and report (1) the value of the real estate set out in the bill belonging to J. E. Curtis, the value of the land in Lazierville conveyed to Sarah B. Curtis by McClure and wife, also the value of the lot in Wellsburg belonging to said Ziliken; (2) what is the rental value of the above-mentioned real estate; (3) what liens are against said real estate, and the amount and priorities of said liens. The court further decreed that, unless defendant paid the amount decreed against him within 30 days from the rising of the court, certain special commissioners therein named should take possession of the printing office, types, etc., used in the Pan-Handle office, and all other property constituting said office, and sell the same as therein directed; and from this decree J. E. Curtis, Sarah B. Curtis, and David H. Hahn obtained this appeal.

The first error relied on by the appellants is claimed to be in the action of the court holding that J. E. Curtis was liable to plaintiffs in any sum whatever on account of the judgment rendered against said plaintiffs by the circuit court of Brooke County, mentioned and described in the decree complained of and the proceedings in the cause. Now, as we have seen, the object of this suit was to compel the defendant J. E. Curtis, to contribute his *pro rata* proportion of twenty-one thousand seven hundred and forty-seven dollars and eighty-four cents, with interest and costs, for which judgment was rendered against plaintiffs, and which is claimed to have been paid by them, and to set aside certain transfers and conveyances made by said J. E. Curtis of his property as void. It appears from the record he was charged with embezzlement, and four indictments were found against him for that offense, in connection with the conduct of the office of sheriff, and that the sureties on his official bond, part of whom are plaintiffs in this cause, were pressing the prosecution of these indictments; that J. E. Curtis, father of J. L. Curtis, sher-

iff, etc., was one of the sureties on his bond, and entered into an agreement with plaintiffs, as he claims, to turn over to J. C. Palmer, one of the attorneys for plaintiffs, certain property, in consideration that the prosecutions against his son J. L. Curtis should be stopped, and he be released from further liability upon the official bonds of said J. L. Curtis. In pursuance of this agreement, it appears that said J. E. Curtis did turn over to said J. C. Palmer property valued in the aggregate at five thousand two hundred and thirty-four dollars and ninety-seven cents, and, in pursuance of the agreement, the indictments were submitted to a jury. The attorney for the State stated, in presence of court and jury, that the evidence was insufficient to justify a conviction of the defendant. No evidence was produced in either of the cases, and a verdict of not guilty rendered in each case. When this property was delivered by J. E. Curtis to Palmer, he receipted for the same, and stated in the receipt that he was to deliver it to John Gibson when the agreement made by S. George and others was complied with, and, if the agreement failed, he was to return it to J. E. Curtis. J. C. Palmer, in his deposition, says he distinctly announced before all of them, in order there might be no misunderstanding between J. E. Curtis and his co-sureties as to what the force of this agreement was, that these securities turned over to him by J. E. Curtis to be given to said Gibson were for the express purpose and in consideration of the settlement of the criminal proceedings against J. L. Curtis, and that it would not relieve J. E. Curtis from the payment of any part of his liability as bondsman of said Curtis, late sheriff. The property turned over by J. E. Curtis to J. C. Palmer, as aforesaid, after the disposal of said criminal proceedings appears to have been handed over to said Gibson, who testifies that he gave two thousand seven hundred and ten dollars, part of the proceeds, to Mr. George, to settle the claim of the county against the sureties of said sheriff about June 1, 1894. There seems to be some conflict in the testimony as to whether this property, amounting to five thousand two hundred and thirty-four dollars and ninety-seven cents received from J. E. Curtis by J. C. Palmer, was to be entirely consumed

in satisfaction of the infraction of the criminal laws, or that it should go further, and relieve said J. E. Curtis from paying his *pro rata* share as one of the sureties of J. L. Curtis. What became of the residue of the property that went into the hands of John Gibson does not appear; but without reference to this property, amounting to over five thousand dollars turned over to Palmer, two thousand seven hundred and ten dollars of which appears to have been paid to S. George, to use in settlement of the claim of the county against the sureties of said sheriff, the court was asked by the amended bill filed in this cause to decree against J. E. Curtis his proportionate share of twenty-one thousand seven hundred and forty-seven dollars and forty-eight cents, interest thereon and costs; and, in pursuance of the prayer of said bill, a decree was rendered against said Curtis for two thousand seven hundred and eighteen dollars and forty-eight cents, with interest thereon from May 31, 1894, which should be reduced one-eighth of all received by the plaintiffs from the defendants Zilliken and Rodgers.

Could the plaintiffs in this case enforce such an agreement as the witness Palmer states was made between them and the defendant J. E. Curtis, to wit, that said defendant should pay them upward of five thousand dollars to have these criminal proceedings against his son stopped, and when they had complied with their part of the agreement by procuring the dismissal of said proceedings, claim and hold the money? Such a contract would seem to be void, on the ground of public policy. Parson on Contracts (8th Ed., vol. 1, p. 440) thus states the law: "A promise to pay money in consideration that the promisee would abandon proceedings in which the public are interested is not sustainable, because such consideration is void on grounds of public policy." Now, when we recur to the fact that John Gibson, to whom was turned over this property of more than five thousand dollars by J. E. Curtis, states that he gave two thousand seven hundred and ten dollars of the amount realized from the notes turned over to him by said Curtis (on which he realized two thousand eight hundred dollars) to Mr. George, to use to settle the claim for the county against the sureties, even if we apply

the maxim, "*In pari delicto potior est conditio defendentis*," we find the agreement, as it was understood by J. E. Curtis, by Arnett, by J. B. Somerville, has been so far executed that the *pro rata* share of J. E. Curtis on his liability as one of the sureties of J. L. Curtis has been paid by John Gibson, or as near as it could have probably been ascertained at the time it was paid; the amount thus paid being two thousand seven hundred and ten dollars, and the amount decreed against J. E. Curtis being two thousand seven hundred and eighteen dollars and forty-eight cents, with interest from the 31st of May, 1894, which last-named sum was to be slightly reduced. So that, if equity leaves the parties where it finds them, this agreement has been carried out as understood by the defendant. As is proven by the weight of evidence, the plaintiffs have already received all they claimed to be entitled to, and cannot recover it a second time. Having reached this conclusion, it is unnecessary to pass upon the other questions raised by the assignments of error as to the *bona fides* of the transactions therein mentioned. The decree complained of is for these reasons reversed, and the plaintiffs' bill dismissed as to the appellants.

Reversed.

45	19
45	708
45	12
150	452
45	12
52	654

CHARLESTON.

GRAFTON & G. R. CO. v. DAVISSON.

(DENT, JUDGE, *absent.*)

Submitted February 2, 1898—Decided April 16, 1898.

1. JUDGMENT—*Equitable Relief—Justice of the Peace—Certiorari.*

Where a case is tried before a justice, and a bill of exceptions essential to enable a party to obtain a writ of *certiorari* is lost, if signed, or if not signed, the justice sickened and died without signing it, and there appears probable ground for a writ of *certiorari*, it is a proper case for equity relief against the judgment, and for retrial. (p. 14.)

2. NEW TRIAL—*Injunction—Issue out of Chancery—Equity Practice.*

Upon a bill in chancery to enjoin a judgment at law, and for a retrial, there must not be a decree before such retrial annulling the judgment and granting a new trial in the law court; but the judgment is allowed to stand as security for what may be found to be justly due, and the injunction allowed to stand until after the retrial, and the decree should direct an issue or issues to be tried in the circuit court to find what the nature of the case requires, and upon the verdict the court should perpetuate or dissolve, wholly or partially, the judgment. (p. 16.)

3. JUDGMENT—*Injunction—Reversal—Lien.*

Where an injunction to a judgment is only perpetuated as to part of it, or a reversal is only as to part of a judgment, the lien of the part not affected continues from the date of the judgment. (p. 17.)

4. RAILROADS—*Right of Way—Fences.*

A railroad company is not bound to fence its line from adjoining improved land except where it has condemned land for its use. (p. 15.)

5. AGENCY.

An agent must be proven to have power to do the act in question. (p. 15.)

Appeal from Circuit Court, Taylor County.

Bill by the Grafton & Greenbrier Railroad Company against Reuben Davisson for an injunction and equitable relief. From a decree for defendant, plaintiff appeals.

Reversed.

W. R. D. DENT, for appellant.

W. T. ICE and L. M. LA FOLLETTE, for appellee.

BRANNON, PRESIDENT:

Davisson sued the Grafton & Greenbrier Railroad Company before a justice to recover pay for a fence built by Davisson along the line dividing land owned by him and another and land of said company on which its track had been constructed; and upon the trial before a jury the company moved the justice to strike out the plaintiff's evidence, because it showed no liability upon the company, but the justice refused to do so, and rendered judgment on the verdict against the company. The justice's docket states that a bill of exceptions was signed; but Davisson says that the justice informed him that it had not been signed. The company applied to the justice for a copy of the record in order to carry the case to the circuit court by *certiorari*; but the justice had in the meantime sickened, and shortly died, without furnishing a copy of the bill of exceptions, and his successor could not find any such bill, and, as the case depended on the showing of the bill of exceptions, the company's recourse to a *certiorari* is blocked. An execution upon the judgment was levied upon a locomotive of the company, and it brought this suit in equity to enjoin the execution and for relief against the judgment; and, the circuit court of Taylor having dismissed the bill, the company appeals.

As the loss of the bill of exceptions, if it was signed, prevents the company from exercising a clear right accorded to it by law,—that of applying for redress to a higher court,—it is manifest that there must be some re-

dressive procedure furnished by law against the accident of loss; or, if the bill was not signed, the case is not changed, as the law must furnish some redress against the loss falling upon the defendant from the dispensation of Providence in the death of the justice who alone could sign the document. In either case the jurisdiction of equity is warranted under the well-known head of equity jurisdiction called "Accident." Equity gives relief under that head, and this case is one of accident. It is undeniably true that, where a court of law has tried a case, any error therein must be corrected by an appellate process, or not at all, as equity does not assume to revise and reverse the action of the law court in those things which it passed upon, and will not do so on matters not before the court, and which could have been operative if presented, but which were not presented, by reason of negligence; but equity will enjoin judgments at law where there is reason to do so because of fraud, accident, surprise, or some adventitious circumstances beyond the control of the party. *Braiden v. Rietzenberger*, 18 W. Va., 286; *Slack v. Wood*, 9 Grat., 43. A fine statement of the doctrine touching equity jurisdiction to give relief against judgments will be found in 2 Tuck. Comm. 475, and *Oliver v. Pray*, 19 Am. Dec., 603. Those authorities admit that when the case is one of accident, beyond the party's control, equity interferes. The present case is as clearly one of accident as *Lec v. Foushee*, cited in *Terrel v. Dick*, 1 Call, 553, where a verdict was found late in the evening, and a motion for a new trial was prevented by the change of the members of the court next morning. And I just notice that in *Knifong v. Hendricks*, the fact that the justices who tried the case had left the bench, preventing a motion for a new trial, was held ground for equity's intervention to give a new trial. 2 Grat., 212. It is stronger than the case of *Oliver v. Pray*, 19 Am. Dec., 595, where a clerk took an insufficient appeal bond and the Ohio supreme court dismissed an appeal, and then equity granted a new trial. These and other authorities show that equity is the only remedy of defendant. The justice could not make another bill of exceptions, because too sick; and, as the case had ended with him, he could not be compelled to do so

except by a *mandamus*, and he was sick. It does not appear that the record can be supplied by evidence, if the statute allowing restoration of lost records applies to justice's courts. At any rate, the appellant had done all it was required to do, had presented a bill of exceptions approved by the justice, and no process, after his death, could supply it; and further, at any rate, we have the accident before us as a fact, and equity is the readiest relief for its cure.

The next question occurring to my mind is whether we should say that the accident barring the company from a *certiorari* is alone cause for equity relief, or must we see that there was good ground for a *certiorari*. As the law gave absolute right to the company to apply for a *certiorari*, and this accident prevented the application, does that alone call for equity relief? If we go further, it would seem to make equity a court of review; and yet ought it interfere where no shadow of ground for charge of error is shown? Ought equity do a clearly vain thing? As the appeal is to equity, I think it must be shown to it that there is probable cause for saying the party had a case of error, as held in *Oliver v. Pray, supra*. Looking then, to see whether there is any ground on which to base the allegation that error was committed to the prejudice of the company by the jury and justice, I think that, on the showing made by the record of this cause, there is such ground. Davisson and his co-owner acquired the land after the railroad was running. It does not appear that the land had been condemned by legal process for the railroad, as it is only where there is legal condemnation that a railroad is required to fence improved land. A contract or understanding of indefinite character between Davisson and Hall, an agent of the company, of power not defined by the record, by which Davisson was to build the fence and be compensated, is relied upon; but that agent must be shown to have power to so contract, and he could make no contract to bind the company to build the fence, if the land had not been condemned. He could not, by express contract, bind the company to do what the law did not require it to do.

Next comes the question, what relief shall we give? We cannot set aside verdict and judgment, and, treating the

case as then one still pending in the justice's court, direct it to be remanded to that court for a new trial, though that would seem to be the sensible course. That would be direct action over the law court. Our decisions forbid this. The theory is that the case is perfectly ended in the justice's court, and, therefore, there can be no new trial there. But I think the theory had its birth in the struggle of courts of law as far back as the reign of Edward IV. against the jurisdiction exercised by chancery courts to control action at law by injunction, which was branded by the defenders of the common-law courts as simply usurpation of a power to virtually reverse and control the proceedings of courts of law. That struggle ended in the triumph of chancery. It became settled that, while courts of chancery could not merely review actual action of a court of law by review and reversal, it could and ought to exercise jurisdiction, in some mode, to relieve against a judgment which, in equity and justice, ought not to be enforced, because of some fact not before the court of law when judgment was rendered, which diligence could not have presented to it, and which after judgment would not—could not—be heard in the law court to affect the judgment. If the chancery court would set aside the verdict and grant a new trial in the same action, the law court would not recognize the order, as it would regard this a direct impingement upon its jurisdiction, and make the chancery court its superior. Hence chancery does not set aside the verdict, and order the law court to grant a new trial, and remand, as does an appellate court when the very case itself is translated into it by appellate procedure; but, having the parties before it in an independent cause, it directs an issue or issues to be tried at its bar, and, upon the result of the trial, perpetuates or dissolves, in whole or in part, the injunction to the judgment, but lets the injunction in the meantime stand. The court must not at once set aside the judgment, and grant a new trial, when it determines that a retrial should be had, but must await its result, as the judgment ought to stand as security until it is finally determined whether it shall be perpetually enjoined or not. *Knifong v. Hendricks*, 2 Grat., 212; *Bank v. Hupp*, 10 Grat., 33; *Wynne v. Newman*, 75

Va., 811; Bart. Ch. Prac. 58; 2 Story, Eq. Jur. § 1574. The judgment ought to be allowed to stand as security, until the final decree, as its lien is good for what may be found to be really due, though obtained by fraud, accident, or surprise, and though what may be due be the whole or only part of the debt recovered (*Bank v. Vanmeter*, 4 Rand., 553, Judge Green's opinion. Judge Lee's opinion, *Bank v. Hupp*, 10 Grat., 33); just as a judgment reversed in part is all the while a lien (2 Bart. Ch. Prac. § 295; *Moss v. Moorman*, 24 Grat., 97). There are cases where at once the judgment was set aside and a new trial granted; but it is improper, as cases above show.

The decree is reversed, the injunction reinstated, and an issue is directed to be tried by a jury in the circuit court to find what amount, if any, Davisson is entitled to recover of said Grafton & Greenbrier Railroad Company for building the fence, and, upon a verdict thereon, to perpetuate or dissolve, in whole or in part, the said injunction as to said judgment, and for such purposes, and others proper under equity practice in such cases, the cause is remanded. I also think it was error not to continue the case to allow Hall's deposition to be taken.

Reversed.

CHARLESTON.

MANN v. PECK *et al.*

Submitted January 25, 1898—Decided April 16, 1898.

1. RES ADJUDICATA—*Commissioner's Report—Liens.*

Where liens on land have been ascertained by commissioner's report and decree, and the land sold by special commissioner for more than sufficient sum to pay all such liens, sale confirmed, purchase money all paid, and a decree entered declaring that all such liens were "fully satisfied and discharged," such decree is *res adjudicata* as to holders of such liens who were parties to the suit. (p. 25.)

2. ESTOPPEL—*Recognition of Transaction—Laches.*

When a party, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. (p. 26.)

Appeal from Circuit Court, Monroe County.

Action by Frank N. Mann against C. L. Peck and others. Judgment for plaintiff, and defendant Jesse Jones appeals.

Affirmed.

J. J. SWOPE, for appellant.

MILLER & READ, for appellee.

McWHORTER, JUDGE:

F. N. Mann filed his bill in chancery in the Monroe cir-

cuit court to enforce a mechanic's lien against the house and lot of C. L. Peck; and on the 8th day of October, 1895, the cause came on to be heard, and it "appearing to the court that there is due to the defendant Jesse Jones the sum of \$190.95, which is a first lien upon the house and lot mentioned, with its interest from October 5, 1885, and that there is due the defendant A. J. Jones, as of same date, the sum of \$302.84, and a bond executed by the defendant Peck to A. J. Jones for \$200, due December 1, 1885, both of which sums are for balance of purchase money due upon the house and lot in the bill mentioned, and to the plaintiff there is due the sum of \$65.47, to be paid next after the purchase money due upon said house and lot is paid, and to the defendant W. R. Johnson the sum of \$56.58, to the defendants H. Coen & Son the sum of \$84.40, and to the defendants G. W. Graves and Clark Howell the sum of \$58.87, which four last-mentioned liens bear interest from the 5th of October, 1895, until paid, and are to be paid in the order named in this decree;" the decree further ordered the payment of several sums, and, upon failure thereof, John Osborne, a special commissioner appointed for the purpose, was to make sale of the property, under which decree the said Osborne sold the same to Frank N. Mann, at the sum of nine hundred and fifty dollars, of which sum he paid eighty-five dollars and thirty cents in cash, and for the residue executed his three bonds for two hundred and eighty-eight dollars and twenty-three cents each, due in six, twelve and eighteen months after date, with interest from the day of sale, with James Mann as security. The said property had been sold by Jesse Jones to his son, A. J. Jones, and the one hundred and ninety dollars and ninety-five cents provided for in the decree to Jesse was the balance due from A. J. on purchase money. By contract dated the ——— day of April, 1884, A. J. Jones had sold the property to C. L. Peck, in consideration of the Alderson Statesman, a newspaper, and certain fixtures, and Peck gave his three notes, each for two hundred dollars, without interest, payable, one December 1, 1884, another June 1, 1885, and the other December 1, 1885, and a note of Luther Graham for seventy-five dollars. After the sale, under the decree to F. N.

Mann, he (Mann) purchased all of these liens provided for in the decree, and purchased and took an assignment of three two hundred dollar notes given by Peck to A. J. Jones, and the Luther Graham seventy-five dollar note, and settled with and paid to Commissioner Osborne the whole purchase money. On the 17th of March, the following decree was entered: "This cause came on to be further heard on the papers formerly read and the report of Commissioner Osborne of the sale made by him under the last decree entered in this cause, to which there are no exceptions, and the same is hereby confirmed. And it appearing to the court that the plaintiff, F. N. Mann, and C. L. Peck have agreed that the property sold and above referred to shall be accepted by the said Mann and the other creditors in full satisfaction of all the liens docketed against the defendant C. L. Peck, and reported by Commissioner Kester, it is adjudged, ordered and decreed that the said John Osborne proceed to collect the bonds of purchaser, and distribute the same among the creditors as agreed upon between them, and that the liens against the said C. L. Peck docketed and embraced in the said report of Commissioner Kester shall be, and are hereby, declared fully satisfied and discharged. And the said Commissioner Osborne is authorized to withdraw the bonds of the purchaser filed in this cause, leaving copies thereof in the papers; and, when all the purchase money is paid, the said commissioner is ordered to execute a deed for the said property to the purchaser, F. N. Mann, and to report his proceedings to this court for a final decree. And the said John Osborne, out of the proceeds of the said sale, is directed to pay all the costs of this suit heretofore and hereafter accrued and accruing in the circuit court, and that the purchaser pay to him a fee of five dollars for the deed hereinbefore ordered to be made. W. G. Hudgin, Attorney for C. L. Peck and Ella H. Peck. Houston & Co., Attorneys for F. N. Mann and H. Cowen & Sons. A. N. Campbell; Attorney for A. J. Jones. J. D. Logan, Attorney for W. R. Johnson. John Osborne, Attorney for G. W. Graves." On the next day, an order was entered in the cause giving leave to the purchaser, Mann, to sue out of the clerk's office a writ of possession, to put him in

possession of said house and lot. On the 6th day of October, 1887, on motion of the plaintiff, the cause was omitted from the docket.

On the 7th day of June, 1894, on motion of the said Special Commissioner Osborne, the cause was reinstated on the docket as having been prematurely omitted, and a rule awarded against Frank N. Mann, the purchaser, to show cause why the property should not be resold to pay the sum of three hundred dollars, balance due and unpaid on the purchase money for said house and lot. On the 10th day of October, 1894, said Frank N. Mann answered said rule, stating that, when he first determined to buy the property, he bought the claims of A. J. Jones, which included that of Jesse Jones, at a discount of eight per cent. from their face value, and turned them over to Special Commissioner Osborne, which included the three notes of Peck, indorsed to him by A. J. Jones; that the transfer was made with the full knowledge of Jesse Jones, and that Jesse Jones had since said that, if A. J. Jones had gotten the money that respondent had promised him for said debt, it was all right, but that, respondent not having paid the money to A. J. Jones, he wanted the respondent to pay it to him, and filed with his answer said three notes and three checks which he had given to A. J. Jones in payment of the notes, and, having fully paid all the purchase money, said Special Commissioner Osborne had made the deed to respondent; and claiming that an acquiescence in this transfer for at least ——— years upon the part of Jesse Jones estopped him from setting up any claim as against respondent; and asking that the said A. J. Jones and Jesse Jones be brought before the court, and the matter inquired into, and determined whether or not Jesse Jones permitted his son A. J. Jones to make this transfer, and, if made without his knowledge, if he afterwards assented to it. And on the 6th of June, 1895, A. J. Jones and Jesse Jones filed their respective answers. Jesse Jones, in his answer, says he was a party to the suit, and that the sum of one hundred and ninety dollars and forty-five cents, with interest from October 5, 1895, was reported in his favor as the first lien by Commissioner Kester in said cause; that Special Commissioner Osborne made the sale of the prop-

erty, and collected the money, but never paid respondent one cent of his recovery in the cause; that he had insisted on payment, but had not been able to collect it; denied that A. J. Jones was ever his agent to collect this money, or that he ever gave A. J. Jones, John Osborne, or F. N. Mann any authority to settle or adjust his claim in any manner. Respondent says that A. J. Jones was a large lienor in the suit, and that he was informed that he did sell or make some agreement with Mann about his claim, but none as to respondent's claim, and denied that he had been guilty of laches in this matter, but, on the other hand, he had for years urged the payment of his money, and he was unable to collect it; that he was going to proceed against Special Commissioner Osborne and his bondsmen for the same, and, to avoid this suit against him, the said Special Commissioner Osborne had the rule against the purchaser, F. N. Mann; and prayed for a resale of the property to pay his debt. A. J. Jones answered, and stated that he did sell his interest in the suit to Mann after the purchase of the property by Mann, but denied that he was agent for Jesse Jones, or that he sold or in any manner disposed of Jesse Jones' claims in it; that he had nothing to do with Jesse Jones' claims; that he never had any authority to attend to Jesse Jones' interests in the cause; and that he never told or intimated to Mann that he represented Jesse Jones in any manner whatever; and that he did not consider that he had any further interest in the suit after he sold his recovery to Mann.

Depositions of various witnesses were taken on the question of the agency of A. J. Jones for his father, Jesse Jones. On the 21st of September, 1895, the deposition of J. L. Rowan was taken, who says: "Some three or four years ago, Mr. Jesse Jones came to me, and my recollection is that he claimed a debt due him from Frank Mann, and that the money was in the hands of Mr. Osborne; and after we talked about it, I went with Mr. Jones to see Mr. Osborne, and get a statement from him as to the status of the case. Mr. Osborne stated that he had paid the money to Mr. Jones' son, and Mr. Jones denied that his son had ever collected it,—that is my recollection,—but said, if he had, of course he did not desire the money to be paid

again, or words to that effect; and I considered the matter dropped then and there, as he said no more to me as counsel." John Osborne testifies that, before the sale, Mann came to him, and told him he had purchased the notes from A. J. Jones, and wanted to know if he would take in Jones' debt as so much money if he bought the property, and he told him he would, and it would only be necessary to exchange receipts in that case to satisfy the Jones debt. He did turn over the notes,—three notes, of two hundred dollars each,—and a receipt from A. J. Jones to James Mann, for fifty dollars, which witness filed as a part of his answer, marked "Y," which is a transfer of the seventy-five dollar note; and he paid him the balance of the purchase money in cash, and he made him a deed as special commissioner for the property; that he heard nothing more of the matter for nearly five years, when, in a suit before Justice I. E. Bare, the matter was brought to his attention by A. J. Jones claiming, in the presence of his father, Jesse Jones, that F. N. Mann had not paid all that he agreed to pay for his debt against Peck; and the cashier of the Greenbrier Valley Bank was examined as a witness, to show that A. J. Jones had been paid through the bank by James Mann's check the sum of four hundred and seventy-nine dollars and ninety-five cents, by Frank Mann's check ninety-seven dollars and eighty-four cents, and the receipt above referred to, also filed, which, with a discount of eight per cent. on the said notes, showed that they had been fully paid; that on that occasion Jesse Jones, although fully aware that F. N. Mann claimed to have bought the entire debt of himself and A. J. Jones, and paid therefor in full, did not dispute the right of A. J. Jones to sell the same, nor make any claim upon him (deponent) upon that occasion for the debt he is now claiming, nor dispute the deponent's right to have paid the same to F. N. Mann, as he had done, and as he knew on that day he had done. Witness further said: "About two years after this, Jesse Jones came to me, and wanted me to pay him this one hundred and seventy-five dollars and its interest, which was reported as a debt of one hundred and ninety dollars and forty-five cents, which was claimed as debt No 1 in said suit. I told him that his son A. J.

Jones had sold this debt to F. N. Mann. He said, "This is the first I ever heard of it." I told him that that would not do, and told him the whole matter had been gone over in his presence in the manner stated above at the trial before Justice Bare, and told him he ought to have objected then. I told him also that, if A. J. Jones had no authority to sell this debt, he had put himself in a very close place. He said that was all right if Frank Mann had paid his son Andy what he promised, but, as Andy hadn't got it, he wanted it. I told him that it had been shown on that trial that Andy had been fully paid. Either on that day or not long thereafter I showed him these notes indorsed by A. J. Jones, and which were filed as Exhibits 1, 2, and 3 to the answer of F. N. Mann to the rule issued against him in this cause. A good while after this, but I can't say how long, Jesse Jones and John L. Rowan came to my office to see me in relation to this matter. I went over the matter fully with both of them, and said to Mr. Jones: 'If Andy has already collected this money, you do not want to make Frank Mann or myself pay it over again, do you?' He said: 'If Andy has gotten the money, it is all right. I don't want to collect it again, but Andy says he hasn't got the money.' I heard nothing more of this matter for about a year, when Mr. J. J. Swope took it in charge and these proceedings were instituted. No money was paid me by Mr. Mann. We simply exchanged paper, I giving up his bonds to me as special commissioner, and taking the three notes above mentioned as evidence of payment of the debt." F. N. Mann, examined as a witness, states that he bought the debts from A. J. Jones, and paid him the full amount, and states how he paid for them, and that on the trial before Justice Bare, mentioned by witness Osborne, the matter of his contract with Jones and the payments to him were fully gone over in the presence of Jesse Jones, and that Jesse made no objections to Andy selling to him his debt, and did not set up any claim to it at that time. The depositions of Jesse Jones and A. J. Jones were also taken, and were, in substance, about the same as their answers, denying the agency of A. J. Jones and his right to sell the claim of Jesse Jones. On the 7th day of October, 1895, the cause was heard upon the rule against

said Mann and Jesse Jones and A. J. Jones, and upon the answers and depositions; and the court held that Frank N. Mann had fully paid all the purchase money for the real estate bought by him, and that he was the owner by purchase from A. J. Jones of the debts decreed to A. J. Jones and Jesse Jones in the suit set out in the commissioner's report, and that the sale of said debts by A. J. Jones to F. N. Mann, even if not known to Jesse Jones at the time, was subsequently confirmed and ratified by said Jones; and the court discharged the rule as to Mann, and gave him costs against Jesse and A. J. Jones, from which decree Jesse Jones appeals, and assigns as error that the court did not allow appellant to recover his money in said proceedings, and did not have said recovery of his debt paid by F. N. Mann, or the property sold to pay the same.

It will be seen that the claim of Jesse Jones was reported by the commissioner and allowed in the decree of October 8, 1885, as the first lien upon the property; that the property was sold upon the 31st day of December, 1885, and that eighty-five dollars and thirty cents cash was paid thereon on the day of sale, the balance to be paid in six, twelve and eighteen months; that on the 17th of March, 1886, the sale was confirmed. The costs of suit were paid out of the cash payment, thirty-five dollars and thirty cents, leaving fifty dollars to apply to the first lien, at the time of the confirmation of the sale, and the first deferred payment after the application of the fifty dollars to the first lien would have been largely more than sufficient to pay off said first lien, so that it should have been fully paid, off in June, 1886. In the decree confirming the sale, on the 17th of March, 1886, the court ascertains and decrees that all the liens reported by said commissioner, and provided for in said decree of sale, were fully satisfied and discharged. This is a complete adjudication of all the principles involved in the suit between the parties,—a satisfaction and discharge of all the liens. Although Jesse Jones was a party to the suit, and owner of the first lien upon the property sold, there is nothing on the record to show that any legal steps were taken to collect his claim until the 7th day of June, 1894, more than eight years after the rendering of said decree declaring the satisfaction and

discharge of the liens. This being a final decree, and appealable, it is *res adjudicata* as to his claim, no appeal having been taken or bill of review filed in the cause. While Jesse Jones denies that he authorized his son A. J. Jones to dispose of his claim for him, he does not absolutely repudiate his action therein, nor does he deny in his answer to the rule the allegation in the answer of F. N. Mann that the claim of Jesse Jones was represented in the notes of C. L. Peck assigned to him by A. J. Jones; neither does A. J. Jones deny the said allegation in his answer to the rule, and a decided preponderance of the testimony is that the whole matter of the sale of the claim of Jesse Jones by A. J. Jones came up at the trial before the justice in the suit of A. J. Jones against F. N. Mann, and was brought to his knowledge at that time, and that he made no objection to the action of his son in selling it, nor did he set up any claim to it at that time; nor does he deny that the whole matter came to his knowledge at the time of the trial before the justice. And the testimony of John L. Rowan shows that it was brought to his attention about 1891 or 1892, some four or five years after the decree was rendered, which is also testified to by Mr. Osborn.

I think the insistence of the appellee that the said Jesse Jones, by waiting and sleeping on his rights, was guilty of gross laches, is sustained. There is nothing in the record to show that Jesse Jones was in a pecuniary condition to conveniently do without the money which was decreed to him, when the property was sold and the money collected, which should have been paid to him for the asking, and to remain without such dues year after year for six or eight years. The circumstances of the case very strongly corroborate the preponderance of testimony taken in the matter, that he knew that his son had sold this claim, and that he had authority from him to do so, or at least that he acquiesced in the action of his son. "When a man, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, * * * or freely and advisedly

abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction although originally impeachable, becomes unimpeachable in equity." Herm. Estop. p. 1194. "If a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief." *Id.* p. 1360; *Trader v. Jarvis*, 23 W. Va., 100. I see no error in the decree and the same is affirmed.

Affirmed.

CHARLESTON.

STEELSMITH v. GARTLAN *et al.*

Submitted February 10, 1898—Decided April 16, 1898.

1. OIL LEASE—*Construction of Lease—Title of Lessee.*

A lease for the purpose of operating for oil and gas for the period of five years, and so much longer as oil or gas is found in paying quantities, on no other consideration than prospective oil royalty and gas rental, vests no present title in the lessee except the mere right of exploration; but the title thereto, both as to the period of five years and the time thereafter, remains inchoate and contingent on the finding, under the explorations provided for in such lease, oil and gas in paying quantities. (p. 34.)

2. OIL LEASE—*Title of Lessee—Nonproductive Well.*

The completion of a nonproductive well, though at great expense, vests no title in the lessee. (p. 36.)

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47	106

45	27
449	243
50	348

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e 51	593
e 51	596
d 52	19
52	2
52	2
d 52	206
52	207

45	27
53	224
53	505

45	27
56	84

45	27
56	167
56	206
56	621

45	27
e63	331

45	27
65	533
65	536
65	540
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66	

3. OIL LEASE—*Construction of Lease.*

Such lease must be construed as a whole, and if there is no provision therein contained requiring the boring of another well after the first unsuccessful attempt is completed and abandoned, the lease becomes invalid, and of no binding force as to any of its provisions. (p. 35.)

Appeal from Circuit Court, Ritchie County.

Bill by Amos Steelsmith against James Gartlan and others. Decree for defendants and plaintiff appeals.

Reversed.

V. B. ARCHER, for appellant.

VAN WINKLE & AMBLER and W. W. ARNETT, for appellees.

DENT, JUDGE:

On the 30th day of August, 1889, Knotts and Garber obtained a lease for oil purposes covering the land in controversy in this suit, without other consideration than one-eighth of the oil produced and two hundred dollars per annum for each paying gas well, with the stipulation that the lessees should complete a well within one year from the date of the lease; and the failure to do so rendered the lease null and void unless the lessees should pay twenty-five cents per acre from and after the time above specified for the completion of said well, when such payment should operate to extend the time for five years. This lease David McGregor considered forfeited, and refused to accept the rent therefor, or continue the same in force. If the conditions had been performed by payment of rent accepted by the lessor, it would have expired the 30th of August, 1895, no well having been drilled by Knotts and Garber. On the 10th day of February, 1895, Matilda McGregor, as devisee and executor of David McGregor, then deceased, executed the following lease to James Gartlan, to wit:

"An agreement, made the 11th day of February, A. D. 1895, between Matilda McGregor, of the district of Grant, county of Ritchie, and state of West Virginia, lessor, and James Gartlan, of Pittsburg, Pennsylvania, lessee, witnesseth: That the lessor, in consideration of one dollar, the receipt of which is hereby acknowledged, and of other

valuable considerations, do hereby demise and grant unto the lessee, his heirs or assigns, all the oil and gas in and under the following described tract of land, and also the said tract of land, for the purpose and with the exclusive right of operating thereof for said gas and oil, together with the right of way, the right to lay pipes over and use water from said premises, and also the right to remove at any time all property placed thereon by the lessee, which tract of land is situated in the district of Grant, county of Ritchie, and State of West Virginia, and is bounded and described as follows, to wit: North by lands of Andrew Douglass and B. & O. Railroad, east by lands of Andrew Douglass and Jacob Hatfield, south by lands of A. M. Douglass and others, west by lands of Andy Hall and others, containing one hundred and twenty-two acres, more or less; to have and to hold the same unto the lessee, his heirs, and assigns, for the term and period of five years from the date hereof, and so much longer as oil or gas is found in paying quantities thereon, yielding and paying to the lessor the one-eighth ($\frac{1}{8}$) part of all the oil produced and saved from the premises, delivered free of expense into tanks or pipe lines to the lessor's credit; and, should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of two hundred dollars per year for such well so long as the gas therefrom is sold, lessor to have gas for domestic use on the premises free, she making her own connections. Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the farm, and to pay all damages to growing crops by reason of operations. No well to be drilled on this lease within five hundred feet of the buildings as now located, without the consent of both parties. In case no well shall be completed on the above described premises within one month from the date hereof, this lease shall become null and void, and without any further effect whatever, unless the lessee shall pay for further delay at the rate of fifty dollars per month in advance thereafter until a well shall be completed. Such payment may be made in hand or by deposit to the lessor's credit in Second National Bank of Parkersburg. If above mentioned well produces 20 bar-

rels of oil per day for the first thirty days after completion, the lessee agrees to drill 2 more wells on the above-mentioned premises within a year from the completion of the above-mentioned well; provided that the second well drilled produces 20 barrels of oil per day for the first 30 days after completion. If second well does not produce 20 barrels per day for first thirty days after completion, then it shall be optional with the lessee to drill the third well. All wells shall be served with the best known means to produce the greatest quantity of oil. A failure to comply with any of the conditions of this lease shall render the same null and void, and of no effect. It is agreed further that second party shall have the right at any time to surrender this lease to first party for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms shall cease and determine, and the lease become absolutely null and void. It is understood that all the terms and conditions between the parties hereto shall extend and apply to their respective heirs, executors, administrators and assigns. In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written. Matilda McGregor. [Seal.] Matilda McGregor, Executrix. [Seal.] — — — [Seal.] James Gartlan. [Seal.]

“Sealed and delivered in the presence of — — — — —.”

Gartlan, with the assistance of others, put down a test hole about one thousand eight hundred feet by April following, but, finding neither gas nor oil in paying quantities, removed the derrick and tools, pulled the casing, and plugged the hole, and left the premises. At the same time he surrendered a number of other leases, but through his agent, Parks, asked permission of Mrs. McGregor to retain the lease under consideration for a short time. During the time the test was made the lessee paid Mrs. McGregor three monthly payments of fifty dollars each, as stipulated, because of delay in completion of the first well. He then discontinued such payments, and entirely abandoned and ceased further operations for oil and gas on the premises. Mrs. McGregor, according to her testimony, before he stopped operations, insisted that he should go deeper, and make a more thorough test, even

being willing to part with a further portion of her interest in the result, if successful, if he would consent to do so. But, claiming that he had made a full test, he refused her request. Gartlan had taken a man by the name of Hays in with him. On the 17th of September, 1896, Mrs. McGregor wrote them the following letter: "Cairo, W. Va., Sep. 17, 1896 Mess. Hays and Gartlan—Gentlemen: As you have abandoned the lease given you by me on our farm, and shown by your actions that you did not intend to operate it any further, I would ask you kindly to send it to me with a release deed, as I am now ready to lease again. Please give this your earliest attention, and oblige, M. McGregor." Getting no reply from this, she wrote another letter to a Mr. Parks, who had acted as agent for Gartlan, to wit: "Cairo, W. Va., September 28, 1896. Mr. Parks—Sir: I wrote a letter some time ago to Mr. Gartlan and your uncle, asking them kindly to send me the lease that they have been holding on my place. You know you only asked me to hold it for a short time, and now I think I have waited a sufficient time for them to make up their minds on what they intended to do; and they have shown, by abandoning the lease, that they did not intend to operate it, so I think they ought to send me the lease at once, so I could be making something out of it, as life is too short for me to let that amount of land lie idle, and not be making even the taxes off it. Now, please take this in consideration, and act on this at once, as you know I mean business. And I understand you have Mr. Gartlan's place in the Co. now. I don't know what position Gartlan holds in the Co. at this time. Now, do please give this your attention at once, as I am going to lease. I am going to get something out of it or nothing, as the case may be. That remains to be seen. I may get a 19½ barrel well next time and may be another dry hole. I can't tell. Now, you understand me. I am going to lease at once if I don't hear from you by return mail. Yours, in haste, your friend, M. McGregor." To this she also received no reply, when she wrote a third letter, as follows, to wit: "Cairo, W. Va., Oct. 3, 1896. Mr. Parks—Sir: I wrote you on the 28th Sep., asking for the lease that your Co. holds on my farm; asked you to answer me by return mail, and I think you have

had sufficient time to write, and now I am going to write you again, and now I want an answer by wire, as I have no time to wait for mails. Well, Mr. Gartlan was here since, and left again without doing anything. He still wants me to wait and see the Wilson and Church wells come in before he does anything, so that will develop the other two sides of the lease. I told him I was not willing to wait any longer; if he was going to do anything, now was the time to do it, while the excitement is up. I can lease now, and to a good advantage; but, if either of those wells should come in dry, it will give another black eye, and I could not lease it at all. So I think he is injuring me in holding this lease from me, and not going to work on it at once, and protecting the lines. If he is not willing to take a risk on it, I am not either. I told him if they wanted to hold it any longer they would have to pay me the back rental. I could have leased it long ago, and been getting more from it than the back rental is worth; but I feel conscientious in the matter, and did not feel disposed to give them any trouble over it, as you know I could be putting a lease on top of theirs. It might cause a lawsuit, at least, and that would cost them more than the rental, so you see I want to treat them fairly, and do what is right by them, if they will let me do so; but, if they will not, then the only thing left for me to do is to look out for myself and the interest of this estate which I represent. Mr. Gartlan promised me he would see your uncle just as soon as he reached Pittsburg, and wire me what he was willing to do in the matter. Now, I will wait a sufficient time for his telegram, and also for yours, and, if I fail to get one, then I am going to lease at once. I have a good offer, and am going to take it now while the excitement is up. I am offered more bonus than all the back rental comes to and the $\frac{1}{4}$ of the oil if there is any, and, if there is none, I will have the bonus anyway. Now you see my offer is a good one, and they can't blame me for taking it. And now for your lease, or the rental at once, as there is no time to wait, and you know I mean just what I say. So please let me hear from you at once by wire, as the parties are waiting, and are willing to take it at their own risk. Please see your uncle at once, and wire me his conclusion. We

have a telegram office here at Cairo. Yours in haste, M. McGregor." Then, getting no satisfaction from the parties, either in the way of rentals or a new lease, on the 22d of October, 1896, she executed a new lease to Amos Steelsmith, the plaintiff and appellant in this case. In the meantime the parties claiming under the Gartlan lease moved some timbers on the land, as though in preparation for again boring, which Mrs. McGregor had cast off. Steelsmith, under his lease, proceeded forthwith to put down two wells, both coming in producers, when, before going to further expense, he filed his bill to cancel the Gartlan lease as a cloud on his title. The Gartlan lessees filed an answer in the nature of a cross bill, claiming the cancellation of Steelsmith's lease and the oil wells and their production, which was sustained by the court, and the relief sought granted. Knotts and Garber, also, to a supplemental and amended bill filed by Steelsmith, filed an answer in the nature of a cross bill, praying for affirmative relief, which was denied, and the bills were dismissed. Steelsmith appeals.

The question of importance presented to the Court is as to whether the Gartlan lease was at an end at the time the Steelsmith lease was executed. The Gartlan lease is, with slight variance, in the usual form of such leases, and amounts to nothing more than the privilege of searching for oil and gas, and, if they be found in paying quantities, then vests an oil and gas tenancy in the lessee for the period of five years or until exhaustion. Mrs. McGregor entered into the lease for the sole consideration of the prospective rents and royalties she would enjoy if the lessee, in diligent search therefor, should find oil and gas in paying quantities. If such lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and voidable, if not void, at the pleasure of either. *Cowan v. Iron Co.*, 83 Va., 547, (3 S. E. 120); *Petroleum Co. v. Coal, Coke & Mfg. Co.*, 89 Tenn., 381, (18 S. W. 65). The only provision in the lease binding the lessee to prosecute operation thereunder with diligence is as follows: "In case no well shall be completed within one month from the date hereof, this lease shall become null and void, and without any further effect what-

ever, unless the lessee shall pay for further delay at the rate of \$50 per month in advance thereafter until a well shall be completed. * * * If above mentioned well produces 20 barrels of oil per day for the first 30 days after completion, the lessee agrees to drill 2 more wells on the above-mentioned premises within one year from the date of the completion of the above-mentioned well, provided that the second well drilled produces 20 barrels of oil per day for the first 30 days after completion." There is no provision made for any further operations or payment of rent in case the first well, when completed, is non-productive. But the contract is at an end as to both parties as soon as such first well is abandoned as unsuccessful. "A vested title cannot ordinarily be lost by abandonment in a less time than is fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite a different ground. The title is inchoate, and for the purpose of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned." *Oil Co. v. Fretts*, 152 Pa. St., 451, (25 Atl. 732); *Plummer v. Iron Co.*, 160 Pa. St., 483, (28 Atl. 853); *Crawford v. Ritchie*, 43 W. Va., 252, (27 S. E. 220). This unsuccessful search and abandonment in this case applies to the first well, the only one the lessee stipulated to put down unless gas and oil were found in paying quantities. He could not, as he himself maintains, be compelled to put down another well; and, he not being bound, the lessor was not bound either, for the only consideration left to her was the prospective oil royalties and gas rentals, which the lessee was in position to entirely defeat. Contracts unperformed, optional as to one of the parties, are optional as to both. Nor can there be a different conclusion if it is held that the lease, being for the purpose of operating for oil and gas, is subject to the implied precedent condition, according to the decisions of some of the states, notably North Carolina, that the lessee shall diligently prosecute the search and operation, for in such case the forfeiture would follow in a much less time than eighteen months under the general clause, to-wit: "A failure to comply with any of the conditions of this lease shali

render the same null and void and of no effect," which necessarily applies to implied as well as express conditions. *Conrad v. Morehead*, 89 N. C., 31; *Maxwell v. Todd*, 112 N. C., 677, (16 S. E. 926); *Hawkins v. Pepper*, 117 N. C., 407, (23 S. E. 434). In the case of *Munroe v. Armstrong*, 96 Pa. St., 307, it was held that a cessation of active operations for thirty days forfeited a lease for oil purposes. The court says, on page 310: "An oil lease yields nothing to the landowner when not worked, and is an incumbrance on his land, tying his hands against selling or leasing to others; but, when idle, it costs the lessee nothing, and is valuable, or may prove valuable, if he can hold it waiting developments in its vicinity. If a well be productive, it is the interest of both the lessor and the lessee that it be continuously operated until its exhaustion, but, if dry, it is of no value. Holding on to a lease after ceasing search is often for purposes of speculation, the thing which a prudent landowner guards against. Forfeiture for nondevelopment or delay is essential to private and public interests in relation to the use and alienation of property." In this case the condition was express, but the same rule applies with equal force to implied conditions. However, as before shown, the lessee having abandoned the only obligatory search provided for in his lease, it died on his hands without surrender, forfeiture or intentional abandonment on his part, for he was without authority to make further explorations without the consent of and arrangement as to conditions with the lessor; in other words, without a new lease or extension of the old. Such leases are construed most strictly against the lessee and favorable to the lessor. *Bettman v. Harness*, 42 W. Va., 433, (26 S. E. 271). When a lease provides the mode, manner and character of search to be made, implications in regard thereto are excluded thereby as repugnant. And the demise for the purpose of operating for oil and gas for the period of five years is dependent on the discovery of oil and gas in the search provided for, and, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title being inchoate and contingent, both as to the five-years limit and time thereafter,

on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a non-productive well. This gave him no new or more extensive rights than he enjoyed before, but in fact destroyed all his rights under the lease. As is said in *Williamson v. Jones*, 43 W. Va., 562, (27 S. E. 411). "As an abortive well neither enhances the value nor yields anything to the true owner, he ought not to be charged with the costs thereof." The lessee would charge the expense of this abortive well as though it were a part of the consideration for this lease, when it was plainly evident that no such thing was ever had in contemplation by the parties, but this is a mere desperate afterthought to furnish a nonexistent money consideration for the continuance of the lease. A dry hole, plugged up and abandoned, while expensive to the lessee, is no advantage, but an incumbrance, to the lessor. Then why should she pay for it by a nonoperating and indefinite extension of the lease, to await the will and pleasure of the lessee, who claims the option to operate, abandon, surrender, or forfeit at his pleasure, while numerous others are clamoring for the privilege of diligent operation, and offering a large bonus therefor? Such a holding would be unconscionable, and contrary to both right and justice. Mrs. McGregor's letters are given at length, to show how fully she understood her rights, and yet how willing, out of tender womanly sympathy, she was, in consideration of her lessee's fruitless expenditures, for which she was in no wise responsible, to give her lessee the first option of a new lease. This she was not required to do, and it was wholly gratuitous on her part, but she did not surrender or lose any of her rights thereby. The reason that the lessee gives for the abandonment of the well and the removal and sale of his tools and machinery being that he was endeavoring to escape the process of the courts of this State to avoid unjust litigation, is not a legal or justifiable excuse. In the case of *Cryan v. Riddelsperger*, 7 Pa. Co. Ct. R., 473, an excuse that the lessee was unable to put down a well on account of the extremely cold weather was held insufficient to prevent a forfeiture, and yet it was much more reasonable than the one given by the lessee in the present case. No excuse, though ever so good, could

relieve from the operation of a contract which was at an end by virtue of its own terms. The time the Garber and Knotts lease had to run, in any event, expired before the Steelsmith lease was executed, and hence they have no rights against the latter lease and cannot attack it in any manner for any reason. For the foregoing reasons the decree complained of is reversed, the lease known as the "Gartlan lease," bearing date the 11th day of February, 1895, is cancelled and annulled, and the injunction originally awarded in this case is made perpetual.

Reversed

CHARLESTON.

ARCHER v. BALTIMORE BUILDING & LOAN ASS'N *et al.*

Submitted February 11, 1898—Decided April 20, 1898.

1. BUILDING AND LOAN ASS'N—*Foreign Building and Loan Ass'n - Domestic Building and Loan Ass'n.*

Foreign building associations legally doing business in this State have the same rights, powers, and privileges, and are subject to the same regulations, restrictions, and liabilities as domestic associations. (p. 40.)

2. BUILDING AND LOAN ASS'N—*Premiums on Loans.*

Building associations are authorized to adopt by-laws fixing a minimum premium at which to award loans to their members, such premiums to be deducted from the loans in advance or paid in periodical installments. (p. 41.)

45	37
48	100
45	37
655	26
45	37
57	446
57	559
45	37
59	209

3. BUILDING AND LOAN ASS'N - *Usury - Constitutional Law*

Section 26, chapter 54, Code, in so far as it exempts building associations from the operation of the general law in relation to usury, is not unconstitutional. (p. 41.)

Appeal from Circuit Court, Wood County.

Bill by Elvira B. Archer against the Baltimore Building & Loan Association and others. From a decree for plaintiff, defendants appeal.

Reversed.

J. G. MCCLUER, OKEY JOHNSON, FIELDER C. SLINGLUFF and J. T. PIGGOTT, for appellants.

V. B. ARCHER, for appellee.

DENT, JUDGE:

The appellee in this case, Elvira B. Archer, was a member of the appellant Baltimore Building & Loan Association, holding fifty shares of stock, of the par value of five thousand dollars. She borrowed on said shares the full par value thereof, to wit, five thousand dollars, which she received in cash, and to secure the same executed her bond and a deed of trust on certain property, enforceable on her failure to pay the premiums, interest, dues, and other charges according to the by-laws of the association. Appellee paid into the treasury of the association at various times the sum of four hundred and fifty dollars, but neglected all further payments as provided in the by-laws, when, her rights becoming forfeited, the trustee was directed to make sale of the property given in security. At this time the association claimed the amount due to be five thousand four hundred and forty-four dollars and eighty-two cents, while the appellee insisted the true amount to be five thousand and twenty-five dollars, and obtained an injunction to restrain the sale until the true amount of the indebtedness was ascertained and determined. After the pleadings were made up, the circuit court referred the case to a commissioner to ascertain the true amount due. He reported it to be five thousand one hundred and sixty-two dollars and eighty-one cents. The appellant excepted, but the court over-

ruled the exception, and entered a decree confirming the report, perpetuating the injunction as to the residue of appellant's claim, and decreeing a sale of the property on non-payment of the sum reported. From this an appeal was taken, and many errors assigned, all of which have been more elaborately argued than the real controversy, as disclosed by the record, deserves. The appellee assigns no errors, but merely asks for an affirmance of the decree. To prevail in this Court, the appellant must show error to its prejudice, which is a complete answer to most, if not all, of the assignments presented and argued. The exceptions to the commissioner's report present the only questions necessary for the consideration of this Court, and these are only two in number:

1. Did the commissioner err in not compounding the interest monthly because payable monthly? This is not insisted on in the argument, but the commissioner's report is apparently conceded to be correct in so far as it relates thereto. It is certainly in accordance with the law of this State. While the interest was payable monthly, it could not be compounded on failure of payment. *Genin v. Ingersoll*, 11 W. Va., 549; *Craig v. McCulloch*, 20 W. Va., 148; *Stansbury's Adm'r v. Stansbury*, 24 W. Va., 634; *Reger v. O'Neal*, 33 W. Va., 159, (10 S. E. 375).

2. Did the commissioner err in not charging Mrs. Archer premium at the rate of fifty cents per share per month? And this is the sole matter of importance presented for our consideration. The first payment of premium was allowed the association, and for which Mrs. Archer was not given credit on the sum due. All other premium charges were disallowed, not apparently because they were contrary to law, but for the reason that they were not authorized by the by-law of the association in relation thereto. The by-law in relation thereto is as follows, to wit:

"Section 1. The funds of this corporation which belong to the loan fund shall be loaned to the member paying fifty cents per share premium therefor, in addition to the stipulated six per cent, per annum interest, upon such terms and security as the board of directors may from time to time approve."

Admitting the contract of Mrs. Archer to be a Mary-

land contract, because it is to be performed in the city of Baltimore, at the chief office of the association, which appears to be the general trend of modern decisions on the subject, yet the legislature has the right to provide the limitations under which foreign corporations may do business in this State, and by section 30, chapter 54, Code, it has provided that "any corporation duly incorporated by the laws of any state or territory of the United States or of the District of Columbia or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this State upon complying with the requirements of this section and not otherwise. Such corporations so complying shall have the same rights, powers and privileges, and be subject to the same regulations, restrictions and liabilities, that are conferred and imposed by this and the fifty-second and fifty-third chapter of this Code, and by chapter 20 of the acts of 1885 on corporations chartered under the laws of this State." The purpose of the law was to put foreign and domestic corporations on an equality in so far as they each transacted business in this State. To enjoy the privilege of doing business here, every foreign building association must conform to the requirements, and comply with the restrictions, imposed on domestic associations. Section 26 of chapter 54 provides that "every such association shall have the power to provide by its by-laws for selling to the stockholders, who bid the highest premium therefor, the money in the treasury, or in default of bidders at or above a minimum premium, may award to a member the value of any share held by him less such minimum premium; the minimum premium and the mode of making the award to be fixed by the by-laws. * * *" Section 29 provides: "Every such association shall adopt by-laws, which shall embrace all the provisions of the four preceding sections, and such further provisions for its government and the management of its business not inconsistent with these sections, as it may deem proper." Having adopted such by-laws, the association is bound by them, and they become a part of the contract of advancements made to its members, and furnish them with information as to the obligations imposed upon them in becoming bor-

rowers. Nor can they be held to any other or stricter obligations as to premiums, interest, dues, and other charges than the by-laws impose. The object of this is that all members shall be treated alike, and not subjected to unequal conditions or those of which they are not fully informed before their undertaking. The statute allows the fixing of a minimum premium, which may be deducted from the loan in advance, or paid in periodical installments; and since the adoption of this provision competitive bidding for loans has become almost obsolete, and rightly so, for it is an unjust, unequal, deceptive, and oftentimes harsh way of disposing of the funds to the detriment of those who were most needy! A minimum premium produces equality, and, being once fixed, borrowing members are not willing to exceed it in their biddings. It thus becomes a question of mere priority of right, and each borrower contributes an equal percentage to the profit or social funds. The by-law of the appellant fixed the premium at fifty cents per share. The appellant insists that it was intended to be fifty cents per share per month, payable monthly, and so it charges up the account against Mrs. Archer. But from its language it is impossible to so construe it. It would be easier to construe it as fifty cents per share per annum, as the words per annum are used in the same clause, and by liberal use of commas, and some stretch of the imagination, might be applied to the premium as well as to the interest. It may be an omission or oversight, but it is one that cannot be supplied in any manner other than by the amendment of the by-law, which would not affect the present controversy. It is therefore plain that the circuit court could not do otherwise than reject the premium claimed other than the first payment. This conclusion, if adopted by the court would render it unnecessary to consider the constitutional question raised. It is, however, said in relation to usury, in 4 Am. & Eng. Enc. Law (2d Ed.) 1073, to be "generally held that an exemption law applying to building associations is valid, although the constitution of the State prohibits local or special laws regulating the rate of interest on money, and declares that special privileges shall not be granted individuals or corporations. Courts of high respectability

have taken the opposite view, however." The advancements made by building associations to their members differ so materially from ordinary loans that the legislature is justified in classing them separately as regards the interest and usury of such transactions. *McEldowney v. Wyatt*, 44 W. Va., 711 (30 S. E. 239). In this case the par value of the share owned by Mrs. Archer was advanced to her in money, she to make monthly payments, including premium, interest, and dues, until the earnings and capital of the association in the class to which she belonged reached the par value of the stock of such class, when the advancements made her and her stock were to offset against each other, and this stock canceled. The capital of the association consisted of the dues paid in, while the earnings consisted of the premiums, interest, fines, and other charges, all of which after the payment of the necessary contingent expenses, formed the social funds of the association, to be applied, when sufficient, in canceling the stock of the membership. The advancements were different from ordinary loans, in that they were not to be paid back, but the members paid in lieu thereof, in monthly installments, premiums, interest, and dues, as required by the by-laws of the association. The monthly installments being considered equivalent to, and not much in excess of, the rental of the property, the money advanced was used in building. Monthly payments, a share in all the earnings of the association proportionate to the amount of the stock held, and the home-building purpose for which the advancement is used are the main distinguishing features from common loans. Such associations, when properly conducted, under judicious restrictions and management, are a helpful blessing and encouragement to a community. But the ambitious extravagance of some borrowing members places themselves in a burdensome condition, from which they are unable to extract themselves, and the sacrifice of their property follows. Far better for the public, the associations, and their membership that many small loans be made rather than a few in number and large in amount. Moderate homes and a moderate price should be the criterion. As a home increases in price, the real rental value thereof decreases in proportion, and the monthly

payment becomes more burdensome. Building associations were not originally intended for the purpose of fostering extravagance, and encouraging the building of expensive dwellings. Their primary purpose was, and should continue to be, to promote industry, frugality, and saving, and convert the shiftless and discouraged into a self-reliant and contented home builder. It is impossible to protect men, and women too, against their own improvidence; yet while the courts have not, the legislature has, the power to limit, by a fixed maximum, the advancements made by associations to their shareholders, so as to effect in a greater degree the evident justification, for their corporate existence. Restrictive limitations will promote the interests of, rather than be an injury to, such associations, as the use of the pruning knife increases the production of the vine. Their being a dispute as to the true amount of her indebtedness, Mrs. Archer had the right to have a court of equity determine it before her property should be put to sale. To obtain equitable relief, it was not necessary for her to tender the amount acknowledged by her to be due. It is the unconscionable demand of more than is justly due that gives equity jurisdiction, and, if this does not exist, equity is without jurisdiction. The by-laws followed in this opinion are those brought up on *certiorari*, as they appear to be the only by-laws furnished to, and acted on by, the circuit court, and the record cannot be amended by the substitution of others, except in some lawful way, and thus present a new and different controversy for the first time in this Court. The by-laws furnished by Mrs. Archer, presumably being those on which the circuit court acted, should govern this controversy. Such by-laws should be free from ambiguity, and obscurity, so as not to mislead or deceive the membership, as they will be construed strictly against the association, and favorable to those deceived thereby. Such being the true status of the case, the judgment should be affirmed. Mrs. Archer, however, in her application proposed to pay a premium of fifty cents per share, payable monthly; which evidently shows she had information of, and acceded to, the construction put upon the by-laws by the association. My associates, therefore,

are of the opinion that she in her written application for a loan, in her deed of trust, and bond executed by her to the association, and by virtue of the by-laws appearing in the original record, bound herself to pay a premium of fifty cents per share monthly, and that such premium so payable is not usurious, under the laws and constitution of this State, nor under the laws and constitution of the state of Maryland, and that she should be held to her contract. In submission to their authority, the decree complained of is reversed, the injunction dissolved, and the bills dismissed for want of equity.

Reversed.

CHARLESTON.

CITY OF CHARLESTON v. BELLER *et al.*

Submitted April 15, 1898 --Decided April 20, 1898.

1. MUNICIPAL CORPORATIONS - *Violation of Ordinance - Public Wrong.*
Violation of the public ordinances of cities, towns, and villages are strictly criminal in nature, being offenses against the public, and not merely private wrongs. (p. 46.)
2. MUNICIPAL CORPORATIONS - *Violation of Ordinance - Costs.*
In prosecutions for such offenses, costs are not recoverable against such city, town, or village. (p. 49.)
3. PROHIBITION
Prohibition is the proper remedy to prevent the enforcement, by execution, of an unauthorized judgment for costs. (p. 50.)

45	44
46	369
46	553
45	44
49	49
50	680

45	44
46	61
45	44
55	478
45	44
56	348
56	349

45	44
63	298
45	44
60	519

Application by the city of Charleston for a writ of prohibition against F. A. Guthrie, Judge, and George Beller.

Writ Awarded.

C. B. COUCH and FLOURNOY, PRICE & SMITH, for petitioner.

W. E. CHILTON, J. H. HOLT, and LOWENSTEIN & McWHORTER, for respondent.

DENT, JUDGE:

The city of Charleston prays a prohibition against the judge of the Circuit Court of Kanawha County, prohibiting the enforcement of a judgment for costs entered against the petitioner, in favor of one George Beller, in a prosecution for a violation of the ordinances of the petitioner originally instituted before the mayor, and appealed by the accused from his judgment to such circuit court. It is admitted that the petitioner would not be liable for costs at common law, and that they can only be imposed by virtue of statutory enactment. The statutes of this State have clearly provided for the allowance of costs in all civil proceedings to the party substantially prevailing; but in criminal proceedings they only allow costs to be recovered against the accused in case of conviction, and in some cases in his favor on acquittal against a private prosecutor, but never against the public, the State, or its authorized representative. A controversy is thus raised as to whether prosecutions for violations of the ordinances of municipalities are civil or criminal proceedings. The legal definition of crime at common law was a capital offense, and all other offenses were misdemeanors. It is now sought to limit the definition, not alone to capital offenses, but to such offenses as are declared to be criminal by positive legislative enactment, known as "felonies" and "misdemeanors," excluding therefrom offenses against the ordinances of municipalities, although imposed by legislative authority. The true definition of the word "criminal," however, as distinguished from the word "civil," as recognized by the laws of this State, beginning with section 3, Art. VIII, of the Constitution, defining the powers of this

Court, and ending with section 232, chapter 50, of the Code, relating to the duties of justices under town and village ordinances, is a violation of any law or ordinance of man subjecting the offender to public punishment including fine or imprisonment, and excluding redress for private injury, punitive or compensatory. Because section 232 provides that "the proceeding in such case shall be by summons in the corporate name of the town or village as plaintiff, and shall conform so far as practicable, to the regulations respecting civil actions before justices," the criminal character of the offense involved is not converted into a demand of a civil nature, for the reason that criminal proceedings, so far as practicable, and not repugnant thereto, always correspond to civil proceedings, unless otherwise provided. Proper process, unless otherwise ordered by the court, in all misdemeanor cases, is a summons, to be followed by a *capias* when necessary (section 14, chapter 158, Code), and in the name of the State as plaintiff. Imprisonment for debt, or arrest in civil cases, except for fraud, has become obsolete. So that section 232, in providing for summons in the name of the municipality as plaintiff, to be converted into a *capias* by indorsement when necessary, complies strictly with criminal procedure; the name of the municipality being merely substituted for the State, to distinguish the prosecutions from each other, and control the disposition of the fines and costs when recovered. Nor is a mayor of any city, town, or village governed by section 231 to 233, inclusive, of chapter 50, Code. Being *ex officio* a justice, he has the right to conform his proceedings to these sections if he chooses so to do. *Ridgeway v. Hinton*, 25 W. Va., 554; *Jelly v. Dils*, 27 W. Va., 282. His authority is not derived from these sections. Their only purpose, notwithstanding the mistakes of punctuation, which do not appear in Acts 1881, c. 8, nor Acts 1885, c. 36, was to confer on justices, strictly speaking,—not mayors,—the authority to try offenses against town and village ordinances, where the punishment was limited to not exceeding ten dollars fine or ten days' imprisonment. The reason that section 230 was not expressly included in section 233 was because it was self-acting, and in a proper case did not need the

aid of another section to make it applicable, its wording being as follows: "Every person sentenced to imprisonment under this chapter by the judgment of a justice, or to the payment of a fine of ten dollars or more (and in no case shall a judgment for a fine of less than ten dollars be given by a justice if the defendant, his agent or attorney object thereto), shall be allowed an appeal to the circuit court; * * * and the court shall proceed to try the case as upon an indictment or presentment, and render such judgment without remanding the case as the law and the evidence may require. If the judgment be against the accused, it shall include the costs incurred in the proceedings before the justice, as well as in the said court, including a fee of ten dollars for the prosecuting attorney, and the jailer's fees, if any." By the use of the words "under this chapter," this section is made applicable to the offenses included in section 231, when the punishment inflicted is imprisonment or a fine of ten dollars and the fine, if so fixed by ordinance, may always be ten dollars if the accused so require. The authority of a mayor of a city, town, or village is not derived from section 231, but exists independent of such section, by virtue of chapter 47, Code, or the special charter of incorporation granted by the legislature. By section 31, c. 58, Acts 1895, the mayor of the city of Charleston is made a justice of the peace within the city, and authorized to exercise all the powers and duties vested in justices, except jurisdiction in civil cases; thus clothing him with the full criminal jurisdiction of a justice, under sections 219 to 230. inclusive, of chapter 50 Code. But neither these sections nor section 231 invest justices or the mayor with any authority or jurisdiction over violators of the ordinances of the city. The mayor, thus being clothed with the jurisdictional powers of a justice in criminal offenses against the laws of the State, has such jurisdiction increased so as to include violations of the city ordinances by section 22, chapter 58, Acts 1895, which is as follows, to wit: "To carry into effect these enumerated powers, the council shall have power to adopt and enforce all needful orders by laws and ordinances not contrary to the laws and constitution of the state, and to prescribe, impose, and enforce reasonable fines and penalties, includ-

ing imprisonment, under judgment and order of the mayor or recorder of said city, or the persons lawfully exercising their functions. * * * This is not an increase of civil, but an increase of criminal jurisdiction; and the mayor, in exercising it properly, conforms his proceedings in all respects, so far as applicable, to the provisions of sections 219 to 230, inclusive, of chapter 50, or, when applicable, he may, at his option, conform to the provisions of section 232. The manner of the procedure, whether by summons or warrant in the name of the town or State, cannot change the nature of the offense from a public crime to a private wrong. Section 230, chapter 50, governs as to costs in all such cases; and there is no provision as to the recovery of costs by the accused in case of acquittal, which conforms to both the common and statute law. Section 163 to 175, inclusive, of such chapter 50, and sections 4 to 11, inclusive, of chapter 138, are applicable alone to civil cases, and therefore this case is clearly exempt from the provisions thereof. The provisions of section 13, chapter 161, Code, that "in no case shall there be a judgment against the state for costs," is a precautionary enactment on the part of the legislature, declaratory of the common law, made necessary from the fact that the chapter provided that certain criminal charges should be paid out of the State treasury; and, through fear from this concession that inference and implication might give rise to a liability on the part of the State for costs, this negative enactment was adopted to settle the question beyond dispute or quibble.

In its governmental capacity, a municipality is strictly a branch of the State government, within the extent of its limitations, both as to territory and powers granted. And in the discharge of their duties, governmental and discretionary, its officers are public officers, for whose acts the municipality is in no wise liable. *Gibson v. City of Huntington*, 38 W. Va., 177, (18 S. E. 447); *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va., 299, (12 S. E. 707); *Thomas v. Town of Grafton*, 34 W. Va., 282, (12 S. E. 478); *Mendel v. Wheeling*, 28 W. Va., 233; *Orme v. City of Richmond*, 79 Va., 86; *City of Richmond v. Long's Adm'rs*, 17 Grat., 375; *Barnes v. District of Columbia*, 91 U. S., 540. The en-

forcement of fines, penalties, and imprisonment under the ordinances of the municipality is a governmental duty for the protection of society against the lawless, and the preservation of peace and good order, and is purely a State or public function; and, while it is done in the name of the municipality, it is by the sovereignty of the State or the people; and therefore, in whatever case the State is exempt from liability for costs, the municipality is likewise. To hold otherwise is to make the municipality liable for the governmental acts of its officers, and subject it to a fine in all cases in which they fail to sustain prosecutions against alleged offenders of its ordinances, and thus subject it to imminent bankruptcy. While costs in civil cases are not penal, in criminal cases they partake of the nature of a fine. Code, chapter 161, section 11. The present case is a clear and effective illustration of what great harm could be done to the public if it were held liable for costs in the case of the failure of prosecutions for criminal violations of law. It is claimed by the respondent that this prosecution and all others similar are an abuse of the mayor's authority, and directly contrary to the resolutions of the common council of the city; and so the circuit court seemingly held, and yet mulcted the city in a fine, at least in effect, for the illegal and unauthorized acts of the mayor in his discretionary and judicial governmental capacities,—just such acts as the city in no event can be held responsible for; otherwise, it could be made liable for the governmental acts of two opposing factions, both claiming to be the legally constituted authorities thereof, and its increased burdens occasioned by such lawlessness would render municipal government unbearable to the public. Instead of being a protecting shield against crime in its manifold and insidious forms, it becomes a mere instrument for revenue only in the hands of its designing manipulators, without regard to the public service or the interests of the people. The corporate name of the "City of Charleston" is a mere nonentity, representative of the people residing in its corporate boundaries; and there is neither law nor justice in inflicting upon them the costs occasioned by public officers instituting public prosecutions without sufficient cause, or failing to sustain them by neglect, oversight, or incapacity when properly

instituted. As a part of the State sovereignty, they are entitled to immunity from such costs.

The palpable error of this Court in allowing costs against a town, as in the case of *Ridgway v. Hinton*, 25 W. Va., when they should have been awarded the town as not responsible therefor in any event,—for it was neither guilty of the error complained of nor liable for costs in such cases,—does not furnish a binding rule on this Court or any inferior tribunal. When the attention of this Court is called to such mistakes,—the result of mere oversight,—it feels irresistibly impelled to correct the same forthwith, that the future baneful effects thereof may be prevented. The judgment of the circuit court being without law to sustain it, prohibition is the proper remedy to prevent its execution. *Norfolk & W. R. Co. v. Pinnacle Coal Co.*, 44 W. Va., 574, (30 S. E. 196); *Wilkinson v. Hoke*, 39 W. Va., 559, 403, (19 S. E. 520); *Manufacturing Co. v. Carroll*, 30 W. Va., 532, (4 S. E. 782); *West v. Ferguson*, 16 Grat., 270. Therefore the motion to quash is over-ruled, and a prohibition is awarded in accordance with the prayer of the petitioner.

Writ Awarded.

CHARLESTON.

COUCH v. CHESAPEAKE & O. RY. CO.

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46	359

Submitted January 15, 1898—Decided April 20, 1898.

RAILROADS—*Accident—Damages.*

Error to Circuit Court, Kanawha County.

Action by James H. Couch, Jr., administrator, against the Chesapeake & Ohio Railway Company. Defendant had judgment, and plaintiff brings error.

Affirmed, by Divided Court.

BROWN, JACKSON & KNIGHT, C. B. COUCH, and J. H. COUCH, JR., for plaintiff in error.

SIMMS & ENSLOW, for defendant in error.

DENT, JUDGE:

On a demurrer to evidence in the case of James H. Couch, Jr., administrator, etc., against the Chesapeake & Ohio Railway Company, the Circuit Court of Kanawha County gave judgment for the defendant. The plaintiff obtained a writ of error. The material part of the evidence is as follows: Frank Morris Hodge, an infant two years of age, was killed while sitting on the end of a cross-tie on the defendant's road, by one of defendant's freight engines. He had but a few moments prior thereto slipped away from the presence of his parents, who resided across the public road from the place of the accident. There were no obstructions in the way, and it was a bright, sun-

shiny afternoon, and the track was perfectly clear for about one-half mile; so there was nothing to prevent a person with good sight, keeping a lookout, from either seeing the child upon or close to the track, as his footprints showed in the ditch he had wandered along it for quite a distance. The fireman was busy firing the engine, while the engineer, whose duty it was to keep a lookout to avoid such accidents, testifies that he was keeping such lookout as was consistent with his other duties; that there was a glare of sunshine along the rails about a foot wide; that he did not see the child until he got within two hundred yards of it, too late to stop the train, and thought it was a chicken until it turned its head. The cylinder cock of the engine struck the child on the head, and killed it.

This case comes exactly within the rule established by this Court in the case of *Gunn v. Railroad Co.*, 42 W. Va., 676, (26 S. E. 546): "If a child trespassing on a railroad track is struck by an engine, the company is liable, if the engineer, by such careful and vigilant lookout as is consistent with other duties, could have seen the child in time to prevent the accident." "So if the child is going towards the track, or running near it, evidently going on it." The undisputed circumstances show that there was no natural object in the way to prevent the engineer from seeing the child. The situation therefore necessarily raises the presumption of negligence, and casts on the defendant the burden of showing that a proper lookout was kept, and the failure to see the child was occasioned by other fault than that of the engineer. The engineer testifies that the lookout was kept, and that he did not see the child until it was too late to save it. He was looking along the track. There was a glare on the rails about a foot wide, and when he got within two hundred yards, he saw something that looked like a chicken, but on closer observation turned out to be a child. If the testimony of the engineer is to be taken as true, then the court did right in sustaining the demurrer. But on whom does the law place the duty of weighing his testimony with the facts and circumstances surrounding the case, and determining his credibility? Not upon the court, but upon the jury. If the jury could say that the facts and circumstances are such, including

the appearance of the witness and his manner of testifying, as to rebut his testimony, and render it unworthy of belief, then the court should not have sustained the demurrer; for the credibility of the witnesses is not for the court to pass upon, but is wholly with the jury. *Scott v. Railroad Co.*, 43 W. Va., 484, (27 S. E. 211); *Akers v. DeWitt*, 41 W. Va., 229, (23 S. E. 669); *Johnson v. Burns*, 39 W. Va., 669, (20 S. E. 686); *Young v. Railroad Co.*, 44 W. Va., 218, (28 S. E. 932.)

If the undisputed facts and circumstances did not tend to contradict the evidence of the engineer, but corroborated it, then the court would sustain the judgment, not because of the evidence of the engineer or other witnesses, but because the corroborating facts render it unnecessary to pass on the weight of the oral testimony or the credibility of the witnesses. Such was the case of *Davidson v. Railway Co.*, 41 W. Va., 407, (23 S. E. 593). The engineer is an interested witness. His apparent negligence is the alleged cause of the accident. He would naturally want to relieve himself from blame and remain in good repute with his employers. His future employment might depend thereupon. The common law, through abundant caution, out of tenderness for the frailties of human nature, excluded the testimony of those in interest; not for the reason that all men, owing to interest, would swear falsely, but that many, under great temptation, would either testify falsely, color their evidence or suppress the truth. Our present law, with more confidence in the integrity of human nature, with but few exceptions, allows all witnesses, however great their interest in the result, to testify, and leaves their credibility and the weight to be given to their evidence to their fellow men who compose the jury. This is a duty that cannot be imposed on the court, and litigants have the right to have it exercised by the jury, where the law places it. If a party, by interposing his demurrer to the evidence, prevents the jury from passing on the credibility of his witnesses, he must be taken to have waived such credibility in so far as the same is contradicted by the facts and circumstances of the case. As to whether the engineer could have seen the child if keeping a proper lookout is a question of fact to be deter-

mined from the circumstances and evidence by the jury, and the circumstances in this case tend to show a proper lookout would have discovered the child in time to have saved it, and hence it is not a question of law for the court. Ordinary human experience will convince any one that if there was nothing to prevent it, and the engineer's sight was good, and he was keeping the proper lookout, he could have recognized this child at least one thousand five hundred feet away,—time and distance enough in which to have stopped his train and saved its life. The excuses he gives for not doing so were matters to be considered and weighed by the jury. The jury may have believed him, and found accordingly, but were prevented from doing so by the defendant, who thereby admits that their finding would have been adverse to the engineer's excuses. As said in the *Gunn Case*, unless we would have set aside the verdict of the jury if they had found for the plaintiff, we must reverse the judgment of the court, and give judgment for the plaintiff.

On the question of damages, the jury fixed the amount at five hundred dollars. The plaintiff assigns as error that the circuit court improperly gave the following instruction, to wit: "The court instructs the jury that in allowing damages in this case, where an infant of only two years of age has been killed by the negligence of defendant's employes, the jury shall not assess punitive, exemplary, or vindictive damages, nor shall it allow damage for the mental suffering or anguish of the parents as a consolation." This is clearly an unauthorized invasion of the province of the jury. The law says: "In every such action the jury may give such damages as they may deem fair and just, not exceeding ten thousand dollars." At common law, damages were not recoverable in such cases. By the English law, commonly called "Lord Campbell's Act," damages in satisfaction of pecuniary losses anticipated were recoverable. The Scotch law allowed punitive damages. Our first enactment on the subject (Acts 1863, c. 98, s. 2) provided that "in every such action the jury may give such damages as they shall deem fair and just, not exceeding \$5,000.00, with reference to the pecuniary injury resulting from such death to the wife and next of

kin of such deceased person." In Code 1868, c. 103, s. 6, the words "with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person" are omitted. Acts 1882, c. 105, further amends the law by increasing the amount of damages that may be recoverable to \$10,000. The laws of the various states are very much at variance on the question. The majority, following the English act, give merely pecuniary, while a respectable minority give punitive damages. Our statute is taken from that of Virginia, and the courts of that state have held that punitive and consolatory damages are proper, contrary to the instruction given in this case. *Railroad Co. v. Wightman*, 29 Grat., 431; *Railroad Co. v. Noell*, 32 Grat., 394. In the case of *Simmons v. McConnell*, 86 Va., 494, (10 S. E. 838) the court refers to and approves the former cases, and adds: "The law allows no measure of damages other than the enlightened conscience of impartial jurors guided by all the facts and circumstances of the particular case."

As to the character and amount of damages, the legislature has full control. *Mayer v. Probe*, 40 W. Va., 246, (22 S. E. 58). It might have provided that the damages should be wholly punitive, vindictive or exemplary; and it would probably have been better to have so done. Death of near relatives produces vague, uncertain, and nonascertainable pecuniary losses, and damages founded thereon are very uncertain, and tend to produce confusion and false swearing; while punitive damages, measured by the loss inflicted and the degree of negligence causing the same, would be much more reasonable, exemplary and satisfactory, punishing the wrongdoer for the preservation of human life and the prevention of unnecessary homicide. The legislature, having great confidence in the integrity and purity of the jury system, and a full reliance on the intelligence, moral uprightness, clear sense of justice, and impartiality of their fellow citizens when called upon, in the capacity of jurors, to sit in solemn judgment upon the lives, liberty and property of others, clothed the jury with full power to determine the amount and character of damages that should be imposed upon a wrongdoer who by his negligence caused the death of his neighbor; the only restric-

tion imposed being that such damages should not exceed ten thousand dollars. In doing so, it was the plain and expressed intention to take away from the courts all power to control the jury either as to the amount or character of the damages to be inflicted. The court is thus inhibited from instructing the jury that they should give or withhold punitive, consolatory, pecuniary or compensatory damages. This is their sacred province, in which they are the supreme judges. In the case of *Turner v. Railroad Co.*, 40 W. Va., 693, (22 S. E. 89) it is said: "The doctrine of punitive damages should be the same in cases where death ensues from acts of negligence as where it does not ensue,"—citing *Mayer v. Frobe*, 40 W. Va., 246, (22 S. E. 58); *Ricketts v. Railway Co.*, 33 W. Va., 433, (10 S. E. 801); *Downy v. Railroad Co.*, 28 W. Va., 732, 733. And also in point 6 it is held that "in all cases of negligence the law governing the assessments of exemplary, punitive, or vindictive damages is the same whether death result or not." To this should be added, "except as modified by legislative enactment," which was certainly understood to be an exception to the principle stated; for this rule as stated is good argument for counsel to make to a jury when they are called upon, under the statute to say what damages they deem to be just and right, as an appeal to their intelligence and sense of justice under the circumstances of the case, but it is not proper, under the plain inhibition of such statute, for the court to give as matter of law controlling their finding. The jury may have disregarded the instruction, and found such damages as they deemed to be just and right. How this may be the court is unable to say, and the instruction being given in violation of the law, in prejudice of plaintiff's rights, and over his protest, must be held to be reversible error.

The question of imputed contributory negligence of the father, not being legally sufficient to bar his action, may be taken into consideration by the jury as a circumstance to be considered in determining the amount of damages to be assessed. This is also a matter under the circumstances of this case, entirely within the province of the jury; and as it affects the measure of the damages, it would be error for the court to give them any instruction in regard

thereto. It is certain that this Court, in the light of the evidence presented, cannot say that the father's negligence with regard to the care of his child was so great as to bar any recovery. And especially is this true in view of the principle stated in the case of *Carrico v. Railway Co.*, 39 W. Va., 86, (19 S. E. 571) to wit: "Though a plaintiff be chargeable with negligence contributing to the injury, yet if the defendant know of the danger to the plaintiff arising from his negligence, and can by ordinary care avoid the injury, but does not, he is liable for his negligence notwithstanding the plaintiff's negligence." This rule applies as well, not only where the defendant knew of the plaintiff's prior negligence, but where he could have known of the same had he been discharging the duty the law imposed on him, to wit, in this case, keeping a proper lookout for trespassers upon the track. The defendant is in the enjoyment of vast public franchises for private gain. While it bestows great benefits on the public for privileges granted, its primary object the increase of the individual wealth of its stockholders. In the exercise of its franchise, the public permits it to rush its heavy trains with immense speed over its track through all portions of the country, but, as a precedent condition thereto, imposes on it the duty of keeping a lookout for unwary and helpless trespassers upon its right of way. This just duty it must require its employe to perform, or endure the consequences of their negligence by a forfeiture of a reasonable portion of its gains, which the public bestows upon those who suffer most because of the neglected duty. This is the way the public has provided for the enforcement of its mandates.

In the foregoing opinion McWHORTER, JUDGE, concurs; but, JUDGES BRANNON and ENGLISH being of the opinion that the judgment of the circuit court should not be disturbed, it stands affirmed by operation of law.

BRANNON, PRESIDENT:

Frank Morris Hodge, a child two years old, was killed while sitting on the end of a cross-tie, by a freight train on the Chesapeake & Ohio Railway, April 18, 1896, and his

administrator sued the railroad company for damages, and, upon defendant's demurrer to the evidence, judgment was rendered for defendant. I do not consider the *Gunn Case*, 42 W. Va., 676 (26 S. E. 546), as controlling this case. In that case it was settled that two children, five and six years old, and more easily seen than this small child, were sitting on a trestle, plain to be seen, at the time they were killed, and had been for 15 minutes before; whereas it is impossible to say when this little child got upon the end of the cross-tie. It had walked, as shown by its tracks, one hundred and eighty feet along the ditch, two feet deep, and climbed up the embankment of the roadbed, two feet high; and why may we not say, from these known, fixed facts, that the engineer did not probably see it until within two hundred yards of it? In the *Gunn Case*, whether the engineer did see the children or not, he could have done so by reasonable diligence, and should have done so, and therefore the company was liable; but in this case no evidence tells us when the child got upon the cross-tie so as to be seen. Then how can we say that the engineer could have seen it? He likely could not have seen it in the ditch, two feet deep; and it might have been in the act of crawling up the roadbed hidden by the ties, until the train was within two hundred yards, so that until then it could not have been seen. Thus, we cannot convict the company till we can say either that the engineer did see the child or could have done so. The dress of the child was brown, about the color of the sand and gravel of the roadbed. The engineer says he first saw it when two hundred yards from it, and even then thought it was a chicken, when later it turned its head, and he saw it was a child,—too late to stop this train, of engine and thirty cars, to save it. He says the rail made a glare before the train in the bright sunshine, and hindered his sight. There is no contradictory evidence as to this. Would the engineer willfully run over and murder the child? The human heart revolts at such a deed, and disbelieves it, and the least liberality tells us that the engineer did not in fact see him before it was too late; and, as above stated, we cannot say that the child was long enough where he could be seen to say that the engineer

could have seen him. For these reasons, JUDGE ENGLISH and I affirm the judgment. *Norfolk Co. v. Dunnaway*, 93 Va., 29 sustains me, holding where a boy eleven years old lying between cross-ties was killed, that the company is not bound to reduce speed or stop when an object is seen on track which it has no reason to believe is, but by possibility may be, a human being.

Affirmed by Divided Court.

CHARLESTON.

MILLER v. WISENER *et al.*

Submitted February 12, 1898—Decided April 20, 1898.

1. **TAXATION—Set-off—Individual Debts—Sheriff.**

A taxpayer cannot set off the sheriff's individual indebtedness to him, even though the sheriff has settled with the State treasury for such taxes. (p. 62.)

2. **FORTHCOMING BOND—Set-Off—Individual Debts—Sheriff.**

No set-off of the sheriff's individual indebtedness can be allowed against a forthcoming bond given on the levy of taxes, under Acts 1893, c. 23. (p. 60.)

3. **CONTRACTS—Public Policy—Sheriff—Attorney—Taxation.**

A contract between a sheriff and a taxpayer, by which the taxpayer is to act as a sheriff's attorney at a fixed sum, to be applied on the taxpayer's taxes, is against public policy, and a court will not apply it as payment on the taxes. (p. 61.)

4. **CONTRACTS—Statute of Frauds—Quantum Meruit.**

A contract to render personal services for a longer term than one year is void, under the statute of frauds, and no suit can be maintained upon the contract itself; but, after performance of the

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45	59
52	479

service, there may be recovery of its worth upon a *quantum meruit*. (p. 62.)

Error to Circuit Court, Berkeley County.

Action by Charles H. Miller against J. Nelson Wisener and others. Defendants had judgment, and plaintiff brings error.

Reversed.

FLICK, WESTENHAVER & BAKER and M. T. ENGLES, for plaintiff in error.

D. B. LUCAS and FORREST W. BROWN, for defendants in error.

BRANNON, PRESIDENT:

Charles H. Miller was sheriff of Berkeley County for a term of four years, commencing 1st of January, 1889, and had in his hands taxes against Wisener for 1889, 1890, 1891, and 1892. The legislature passed chapter 23, Acts 1893, providing that a sheriff of a former term should have power of distress for taxes unpaid, and gave the party whose property might be levied on the right to give a forthcoming bond, such as might be given in case of the levy of a *fiery facias* or distress warrant, and provided that such bond should be returned to the clerk's office of the circuit court, and that such proceedings might be had thereon as were provided in relation to forthcoming bonds under distress warrants, and that "defense may be made to a suit or motion upon such bond that the amount levied for is not due in whole or in part, or that the levy or distress is otherwise illegal." Miller levied the said taxes upon Wisener's property, and Wisener gave such forthcoming bond; and a motion for an award of execution on said bond was made by Miller in the circuit court of Berkeley, and Wisener filed plea of payment and specification of payment and set-offs. The case was tried, and, upon a demurrer to evidence, judgment was rendered for Wisener, and Miller comes to this Court by writ of error.

Wisener's defense is that, before the opening of Miller's term as sheriff, they made a contract by which Wisener was to act as counsel for Miller, as sheriff, for his term of

four years, for three hundred dollars per year, and that it was to be applied in satisfaction of Wisener's taxes. The question then comes up whether Wisener can get in his claim either as set-off or as payment. I will first inquire whether it can be admitted as a set-off. I think it cannot be, because public taxes are not liable to set-off. *Humphreys v. Patton*, 21 W. Va., 223. But it is contended that that rule of the common law cannot prevail in this case because of the wording of the said statute, when it says that defense may be made "that the amount levied for is not due in whole or in part, or that the levy or distress is otherwise illegal." I do not think that that provision will admit a set-off, because, before that act, it was not allowable, and the words of the act do not create a new defense; nor can we fairly suppose that the legislature intended to create a defense not valid already under the law. That clause was only intended as a saving clause, to prevent the bond from operating as an estoppel or bar against existing valid defenses which would have been admissible against the taxes without the bonds, and not to create new defenses. *Allen v. Hart*, 18 Grat., 722, is cited to support the adverse theory; but I think a correct interpretation of that case will support my theory, and overthrow the adverse theory. That case holds that set-off may be allowed against a forthcoming bond given under a distress warrant for rent. Now, that bond was substituted for the action of replevin and its bond; and Judge Moncure saw clearly that when the statute which he had in hand declared, as does the statute we now have in hand, that defense might be made on the ground that the "distress was for rent not due in whole or in part, or was otherwise illegal," it allowed just such defenses as might have been made under the old law to an avowry for rent in the action of replevin,—that it preserved those defenses only. He did not pretend that it enlarged defenses against rent by giving defenses not before existing. He proceeded to show, therefore, that set-off was allowable to an avowry for rent and therefore was allowable against a forthcoming bond under a distress for rent, as it took the place of replevin, and the statute saved all defenses which were admissible in that action. While set-off had been clearly al-

lowable in replevin, yet he had to strain to get that defense in under the language of the statute allowing "defense on the ground that the distress was not due," as set-off was a separate cause of action. How much harder the strain necessary to admit set-off in this case when we know that set-off is wholly inadmissible against taxes. It was only because it was a rent demand liable by law to the defense of set-off that set-off was allowed in that case; and thus that case would argue that, as set-off is not applicable to taxes, the clause in our act of 1893, giving the taxpayer defense, that "the amount levied for is not due in whole or in part," does not save the defense of set-off or grant it as a new defense.

I next inquire whether the demand of Wisener can be allowed as a payment. Miller's counsel contends that it is but a cross demand, never actually applied as payment,—only an unfulfilled agreement to apply it. If this were so, it could not be a payment, but a set-off, as a cross demand cannot be made a payment except by agreement. 18 Am. & Eng. Enc. Law, 152. The question is whether this agreement was merely executory, and hence needing actual execution as a payment, and, in its absence, not a payment. I think that, as the services were performed and the contract executed, it would be a payment in its nature, as "a payment is, by consent of parties, either expressed or implied, appropriated to the discharge of the debt." Wat. Set-off, 8. I think that, on a demurrer to evidence, we must say that there was a previous agreement to apply it as payment, thus taking it out of the category of set-offs, and as the services were rendered, if the agreement were valid, it would be a payment. We are asked to apply Wisener's demand as a payment, and we must inquire as to its validity; and we find it to be an agreement between a sheriff and an attorney at the opening of the sheriff's term of four years, by which he employs the attorney for four years ahead, at a fixed sum, to be applied in discharge of public taxes. Such a contract is contrary to public policy, because it tends to divert from the public treasury its money to pay the sheriff's private debt, and no court ought to enforce it. The sheriff can receive nothing but money in payment of taxes. 2 Desty, Tax'n.

693; *Humphreys v. Patton*, 21 W. Va., 220, is to this effect. In *Merriam, v. Dorcy*, (Neb.) 36 N. W., 382, an attorney contracted with the city of Plattsmouth, Neb., to act as its attorney for his taxes as compensation; and, it not appearing that the city had so applied these services, the court would not treat them as a payment. In *Routchler v. Huckle*, 3 Ill. App., 144, it was laid down that, "on grounds of public policy, no arrangement can be made between the court and property owner whereby the owner or the property can be discharged from liability by merely marking the taxes paid on the tax books."

It is claimed that, after time for payment by a sheriff into the treasury, the law presumes such payment, and that taxes then become a private debt liable to set-off. This seems not to be so. If so, why did it not admit set-off in *Humphreys v. Patton*, *supra*, where some of the taxes were two years old? The proposition that, when he has settled with the treasury, the taxes are open to set-off, is not supported by authority. *Davie v. Blackburn*, (N. C.,) 23 S. E. 321. But there is a consideration which, to my mind, denies this suggestion any force, and it is that not only is there no proof that the county and district taxes had been paid in this case, but, if they had been, it would make no difference, as the sheriff is treasurer as to them, and the fund in his hands is applicable to any draft that may come; and to allow a set-off would be to divert money, in law applicable thereto, to meet private debts, and let the public drafts go unpaid. In *Hinchman v. Morris*, 29 W. Va., 699, (2 S. E. 863), JUDGE GREEN expresses the opinion that where the sheriff had paid to the treasury a taxpayer's tax, and the statute gave him further time to levy, that statute would not operate to give him a right to recovery as if based on private demand against the taxpayer; that is, it would still be merely a tax. If so, that excludes the set-off.

It is contended that this contract to perform attorney's services is void, under the statute of frauds, as a contract not to be performed within a year. It was not intended to be performed in one year, nor could it possibly be, and it would be void under that statute. 8 Am. & Eng. Enc. Law (1st Ed.) 685. "A contract for performing services

which by its terms is to continue for a longer term than one year, even to the extent of one minute, is within the statute." Wood, St. Frauds, §§ 273, 274. Such would be the case were there a suit for infringement of the contract in failure to give employment, or where the contract is to be appealed to as the only ground of recovery, where there can be no recovery save by and through it as an indispensable instrument of evidence; but I do not understand that, if the labor has been performed, there cannot be a recovery on a *quantum meruit* by proof of the labor alone, without calling on the contract as the sole instrument of evidence. And as our statute does not declare the contract void, it would furnish the measure of recovery. *Id.* § 277; Browne, St. Frauds, § 116. We reverse the judgment, and enter judgment for plaintiff.

Reversed.

CHARLESTON.

STATE v. ALLEN.

(BRANNON, PRESIDENT, *dissenting*.)

Submitted January 22, 1898—Decided April 20, 1898.

1. CRIMINAL LAW—*Trial—Prisoner in Manacles—Court's Discretion.*

While the practice of keeping a prisoner manacled when on trial before a jury has always been held in disfavor in England, and also in this country, yet the trial court has a discretionary power therein, but a power which should not be exercised under ordinary circumstances, or in any case where the prisoner is not violent and obstreperous, or escape be threatened; and such restraint should not be imposed except in cases of immediate necessity. (p. 68).

2. CRIMINAL LAW—*Prisoner in Manacles—Record—Court's Discretion.*

When the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in not causing them to be removed. (p. 69).

3. CRIMINAL LAW—*Pleading in Person—Felony—Record.*

A prisoner indicted for felony should be present in court, and should plead in person, and the record should show that fact. (p. 70).

4. CRIMINAL LAW—*Pleading in Person—Record.*

When the record shows that such prisoner was led to the bar of the court in the custody of the sheriff, and "thereupon the prisoner, for plea, says that he is not guilty in manner and form as the state in her indictment against him has alleged, and of this he puts himself upon the country," it is sufficiently shown that he pleaded in person. (p. 70).

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48	441
48	448
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49	719
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52	429
45	65
57	148
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58	687

5. CRIMINAL LAW—*Record—Presence of Prisoner.*

Where the record shows that at the beginning of the trial in any day's proceedings the prisoner was set to the bar in the custody of the sheriff, it will be presumed that he was present during the proceedings in the case the whole day, although it does not show at the close of the day's proceedings that the prisoner was remanded to jail. (p. 71).

6. ARGUMENT OF COUNSEL—*Court's Discretion—Record.*

Counsel necessarily have great latitude in the argument of a case, and it is, of course, within the discretion of the court to restrain them; but with this discretion, the appellate court will not interfere, unless it clearly appears from the record that the rights of the prisoner were prejudiced by such line of argument. (p. 74).

7. INSTRUCTIONS—*Error.*

When an instruction of the court assumes certain things as facts, and is in such shape as to intimate to the jury what the judge believes the evidence to be touching such facts, it is error to give such instruction, although it may propound the law correctly. (p. 75).

Error to Circuit Court, Wyoming County.

James R. Allen was convicted of murder, and brings error.

Reversed.

JOHN M. McGRATH, for plaintiff in error.

EDGAR P. RUCKER, ATTORNEY GENERAL, for the State.

McWHORTER, JUDGE:

James R. Allen, indicted in the circuit court of Wyoming County for the murder of James Harvey Ferguson, otherwise known as Dr. James Harvey, was committed, and on the 27th day of March, 1897, the said court rendered judgment on the verdict of the jury, and sentenced him to be hanged on the 30th day of June, 1897, from which judgment said Allen obtained from this Court a writ of error and super-seedeas, and assigned the following errors:

"First. The court erred in setting prisoner to the bar, arraigning him, and putting him upon his trial, manacled with cuffs of iron. Second. The court erred in refusing to permit petitioner to cross-examine witnesses whose affidavits were filed in resistance to petitioner's motion to

amend the record so as to show that he was absent from the bar of the court and the court room at the time the demurrer in this case was entered, considered, and overruled. Third. The record in this case does not show whether petitioner's plea of not guilty was pleaded by him in person or by attorney. Fourth. The record does not show the presence of petitioner on the 25th of March, 1897, at the conclusion of the proceedings of that day. Fifth. It does not appear from the record in this case how the twelve jurors who tried this case, or any of them, were selected and tried, or that they, or any of them, were selected from the twenty jurors who were examined and placed in the box. Sixth. It does not appear from the record that the juror T. F. Shannon, Sr., who signed the verdict of the jury in the case, is one of the jurors sworn for the trial thereof. Seventh. The record does not show that the jury was brought into court on the 24th day of March, 1897, in the custody of the sheriff of the county, or any of his deputies; nor does it show when or how said jury came into court on that day. Eighth. The court erred in permitting improper evidence to go before the jury, as will appear from defendant's bill of exceptions No. 2. Ninth. The court erred in permitting counsel for the state, in his concluding argument before the jury, to make improper statements. See defendant's bill of exceptions No. 3. Tenth. The court erred in giving instructions Nos. 1 and 2 asked for by the State, and in declining and refusing to give to the jury instructions Nos. 4, 6, and 7 asked for by petitioner. Eleventh. The court erred in passing sentence upon petitioner, there being no judgment of guilty pronounced upon the verdict of the jury in this case. Twelfth. The court erred in pronouncing the death sentence upon this petitioner without having first asked him what, if anything, he had to say why the court should not proceed to pass the sentence of the law upon him. Thirteenth. The court erred in passing sentence upon this petitioner, because it does not appear that the court had jurisdiction to try the case. The crime, if any was committed, is not shown to have been committed in Wyoming county. The venue has not been proved. Fourteenth. The verdict in this case is manifestly contrary to the law and evi-

dence therein. The court erred in overruling petitioner's motions in arrest of judgment, to set aside the verdict of the jury in this case, and to grant him a new trial."

First assignment,—the prisoner was set to the bar with iron cuffs upon his wrists: While this practice has always been held in disfavor in England, and also in this country, yet it seems to be a matter largely in the discretion of the court; and I must say that it is a discretion that should not be exercised under ordinary circumstances, or in any case where the prisoner is not violent and obstreperous, or escape be threatened, and such restraint should not be imposed except in cases of immediate necessity. Whart. Cr. Pl. & Prac. §540a. In *Lee v. State*, 51 Miss., 566, Syl. point 2, it is held that "a prisoner undergoing trial should be free from shackles; but, if the court or sheriff deem them necessary to prevent escape, may order him kept in irons during trial, and this will not be ground for reversal." In *People v. Harrington*, 42 Cal., 165, it is held to be error, and the judgment reversed; but in that case the defendants, when arraigned, asked that the irons be removed from their limbs while they were being tried, and "the court refused to order the same to be done, and ruled that they should be tried while in irons,—no circumstances or facts being shown to the court why a different rule should be enforced in this case than any other,—the court being of opinion that no rights of defendants were violated by being tried in irons without their consent; to which ruling defendants excepted." In that case the syllabus is as follows: "Any action of the court, during the progress of a trial for felony, which deprives the defendant of a substantial legal right in the premises, or, to his prejudice, to any extent, withholds or abridges a substantial, legal, or constitutional privilege of a defendant, and by him claimed on the trial, is a proper subject-matter of review on appeal. By the common law the prisoner is entitled to appear for trial, upon his own plea of not guilty, free from all manner of shackles or bonds, unless there is danger of his escape. To require a prisoner, during the progress of his trial, to appear and remain with chains and shackles upon his limbs, without evident necessity as a means of securing his presence for judgment, is a violation

of the common-law rule, and of the thirteenth section of the criminal practice act." It will be seen that in this case the defendants asked to have their shackles removed, and the court refused to have it done. To my mind, the true rule on this point is laid down by Justice Bristol in delivering the opinion of the court in the case of *Territory v. Kelly*, 2 N. M., 305: "When the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in refusing to order the irons to be removed." In the case at bar, however it seems to have been an oversight that the prisoner was brought in manacled; for, the moment the matter was called to the attention of the court, they were ordered removed, and were at once removed, in the presence of the jury. And it would seem, too, that the prisoner as well as his counsel, either thought nothing of it, or concluded it would have a tendency to create sympathy in the minds of the jury for the prisoner, as they never mentioned the matter until the State had rested and the most of defendant's witnesses had been examined, and the defendant himself was being cross-examined as a witness.

Defendant, in his brief, says: "Believing the second assignment to be without merit," and passes on to discuss the third assignment. I quite agree with the defendant as to the second, and after a careful examination of the record, I think his remark would apply just as well to the third. There is no question raised as to the prisoner's personal presence in court at every stage of the trial, except under the said second assignment, and the record shows so conclusively his presence at that time that the said assignment is abandoned. Counsel for appellant cites many authorities to show that the record must show affirmatively, not only that the prisoner was present in person, but that he, in person, put in the plea of not guilty. This we admit to be the law well established, as laid down in *Sperry's Case*, 9 Leigh, 623, in *Sulfin's Case*, 22 W. Va., 771, in *Younger's Case*, 2 W. Va., 579, and numerous other authorities cited. It appears from the record that on the 23d day of March, 1897, came the State by her attorney,

and the prisoner was set to the bar of the court, in the custody of the sheriff; and the prisoner demurred to, and moved the court to quash, the *venire facias*, which motion was overruled, to which ruling the prisoner, by counsel, excepted; and the prisoner tendered, and asked leave to file, his special plea in writing, in the nature of an abatement, to the filing of which the attorney for the State objected, which objection was overruled and the plea filed, and the attorney for the State replied generally thereto and the court proceeding to try the issue on said plea, after hearing the evidence, found for the State, to which ruling of the court the prisoner, by counsel, excepted. Thereupon the prisoner demurred to the indictment, in which the State joined, which the court overuled, and "thereupon the prisoner, for plea, says he is not guilty in manner and form as the State in her indictment against him has alleged, and of this he puts himself upon the country; and the State doth the like." In *Sperry's Case, supra*, the record shows that on the 29th day of September, 1837, the accused was led to the bar in custody of the keeper of the jail, and thereupon was arraigned and pleaded, and on his motion the case was continued until the first day of the next term; and on the 27th day of April, 1838, "came as well the attorney for the commonwealth, as the prisoner, by his attorney, and came a jury," etc. It was held that "an appearance by attorney cannot imply that the prisoner was personally present in court, and therefore the record is deficient in what the law regards as essential to be stated in such a case," for which error the judgment was reversed. So in all the cases cited either the appearance or plea was by attorney. In the case at bar the prisoner was set to the bar of the court in the custody of the sheriff, which shows clearly his personal presence in court. The record further shows that "the prisoner [not by attorney, but the prisoner,] for plea says he is not guilty." The prisoner, if the record can be relied upon (and we can look to no other source), speaks for himself, and says he is not guilty,—a fact which could not be more clearly expressed in words.

Fourth assignment,—that "the record does not show the presence of the prisoner on the 25th of March, at the

conclusion of the proceedings of that day:" On that day it appears that the prisoner was set to the bar of the court in the custody of the sheriff. It is claimed that, because at the conclusion of the day's proceedings the prisoner was not remanded to jail, he cannot be presumed to have been present during all the day's proceedings. When the record shows his appearance at the beginning of the trial for the day, it must be presumed that he was present all day, at least, when anything was done in his case. The record of his appearance is required but once on each day of his trial, and that in the beginning, before anything is done in the case. Were it otherwise, every time the prisoner had occasion to leave the court room for any purpose, in the custody of the court's officer, including the recess taken by the court for the noonday meal, as is usual, the record would have to notice the prisoner's absence and his reappearance every time. When his personal appearance is entered at the beginning, he must be presumed to be present all the day while his case is being considered.

As to the fifth assignment, it appears from the record that the drawing and summoning of the jury were regular, under the statute providing therefor; and the order impaneling the jury, after entering up the pleadings, says: "Thereupon there was selected, examined and placed in the box, in the manner prescribed by law, twenty qualified jurors; and the prisoner moved the court to quash the *venue facias* and array thus formed, which motion was overruled by the court, to which ruling of the court the prisoner excepted, and asked that said exceptions be saved to him. Thereupon the attorney for the State struck two jurors from said panel, and the prisoner, by counsel, struck six jurors from said panel, and the prisoner moved to quash said panel, which motion was overruled by the court; and the prisoner excepted to the ruling of the court, and asked that said exceptions be saved to him. Thereupon E. E. Cook, C. F. Smoot, Elihu Green, W. H. H. Stewart, I. F. Cook, Elisha Brown, Lee Bailey, Lewis Bailey, Dell Cook, J. R. C. Poe, T. F. Shannon, and J. H. Cozort were impaneled, selected, tried and sworn, in the manner prescribed by law, to well and truly try and true deliverance make between the State of West Virginia and

James R. Allen, the prisoner at the bar, whom they should have in charge, and a true verdict render according to the evidence," etc. It will be seen that the prosecuting attorney first struck off two from the panel of twenty jurors in the box, and then the accused struck off six, as provided in section 3, chapter 159, Code; thus leaving the twelve jurors sworn.

Sixth,—that the verdict was signed, not by T. F. Shannon, the juror sworn in the case, but by T. F. Shannon, Sr.: And it is claimed the record does not show that he was one of the jurors sworn, and, in support of this assignment of error, petitioner cites *Younger's Case*, 2 W. Va., 579, where it appears that P. B. Shively signed the verdict as foreman, who was a person altogether different from the name of any man sworn on the jury; and the court says: "And if the record had shown that the jury had been properly sworn, and all the other prerequisites had likewise appeared yet still the fact appearing that the juror who signed the verdict was other and different from any of the jurors named as having been sworn, and there being no averment that this odd man had been sworn, this of itself would be sufficient to set aside the judgment and verdict." In the case at bar T. F. Shannon was sworn as a juror. The record shows that the jury was kept together in the custody of the sheriff, and the mere manner of signing the name is not sufficient to raise a question as to the identity of the juror. In the case of *State v. Morgan*, 35 W. Va., 260, (13 S. E. 385), a juror by the name of Jeremiah S. Peirpoint was sworn in the case, and the verdict was signed by P. S. Pierpoint. JUDGE BRANNON in delivering the opinion of the Court in that case says: "Are we to say that while the jury was in the custody of the sheriff, and kept together and secured, one of them escaped, and another man was substituted, or that another man got into the case? We think not, especially when an explanation of the apparent discrepancy so readily presents itself. The *Younger Case*, does not compel us to such an unreasonable decision, which would bring the administration of criminal justice into ridicule; for there the juror signed the verdict as P. B. Shively, while the sworn panel showed no such name, the nearest

approach to it being P. B. Smith." It is not at all unusual for men in the country, when writing their names, to write them differently at different times; leaving off the "Jr." or "Sr." sometimes, and at other times attaching it. There can be no doubt about the identity of this juror Shannon.

Seventh assignment,—that the record fails to show that the jury was brought into court on the 24th of March: While it may be said to be irregular, not showing their appearance at the calling of the case, the order does say that after hearing part of the evidence, and the hour of adjournment coming on, the jury was committed to the charge of the sheriff, etc., showing their presence at the court; and the order of the day before shows that they were committed to the care of the sheriff or his deputies, and their presence on the 24th is sufficient to show that they were brought into court in custody of the officers of the court. "By a fiction of law, the whole term of the court is regarded as one day, though, when important, the particular day or even hour, may be shown. Hence the record need not specify the adjournment from day to day within the term." 1 Bish. Cr. Proc. § 1352.

It is unnecessary to discuss the eighth assignment, as it is immaterial.

The ninth assignment,—that the court erred in permitting counsel for the State, in his concluding argument before the jury, to make improper statements as set forth in bill of exceptions No. 3. It appears that Mr. Turley, for the defense, in his argument to the jury, said: "There is not in the country 12 honest men who would find the verdict of guilty on the evidence in this case." Mr. Shumate, attorney for the State, in reply, made use of the following: "Mr. Turley says there are not twelve honest men in the county who would find a verdict of guilty on the evidence in this case; but I say to you that there are not only twelve honest men, but many honest men, in the county, who would find a verdict of guilty on the evidence in this case,"—to which remarks the prisoner objected, and asked the court to say to the jury that said remarks were improper, but the court declined to do so, and the prisoner at the time excepted. The statement of the prosecuting at-

torney was provoked by that of the attorney for the prisoner, and a reply to it. There was no argument either in the statement or reply. The statement of defendant's attorney was, of course, intended to have its effect on the minds of the jury favorable to the prisoner, while the reply was intended to counteract such effect, if it had been produced, and it was most natural and reasonable to so reply. Average jurors are men of reasonably sound judgment and discretion, and it is not presumed that such remarks by counsel on the one side or the other will influence or bias their judgment in weighing the evidence submitted to their consideration. In the case of *State v. Shores*, 31 W. Va., 491, (7 S. E. 413), on page 500, 31 W. Va., and on page 418, 7 S. E., the attorney for the State in the concluding argument, "argued that if the prisoner and his associates were capable of committing the several offenses which the evidence showed that they had openly committed on the night of the 27th of February, 1888, and as admitted by their counsel in his argument, then it followed that they were capable of committing openly the crime with which they stood indicted. The prisoner at the time objected to the argument of the counsel but the court held the argument proper, and permitted him to proceed. The argument referred to was made in reply to argument of the prisoner's counsel of the unreasonableness of the State's theory, that the prisoner would commit the crime charged against him in the indictment as shown by the evidence. To which ruling of the court the prisoner excepted, As to the statement of the first counsel, the court ruled it out as improper. That is all the court could do, and the prisoner was not prejudiced. As to permitting the second counsel to proceed, the court did not err. As the record shows, it was a proper reply to arguments of prisoner's counsel. Counsel necessarily have great latitude in the argument of a case, and it is of course, within the discretion of the court to restrain them; but with this discretion the appellate court will not interfere unless it clearly appears from the record that the rights of the prisoner were prejudiced by such line of argument." .

As to tenth assignment: Instructions Nos. 1 and 2

given for the State, of which the prisoner complains, are as follows: "(1) The court instructs the jury that previous threats or acts of hostility, however violent they may be, will not justify a person in seeking and slaying his adversary. (2) The court instructs the jury that, where a confession is received in evidence, the jury may believe that which charges the prisoner, and reject that which is in his favor if they see sufficient grounds for so doing from the evidence in this case." The first instruction is in the exact words of point 9, Syl., *Abbott's Case*, 8 W. Va., 741, only substituting the word violent," in the instruction, for "relevant," in the syllabus, and propounds the law correctly; but given as it was in this case, as a bare abstract proposition of law, it was calculated to mislead the jury, because the court seems to assume that it had been proved in the case that the prisoner sought and killed his adversary. At least the jury might have been led thereby to think that it was the court's opinion that it had been so proved. There was evidence tending to prove that the prisoner laid in wait for the deceased, and was seeking to slay him, but whether that fact was established by the evidence was a question solely for the jury; and the instruction should have been so qualified as to say that, if they believed from the evidence that the prisoner was seeking to slay his adversary, he was not justified therein by previous threats or acts of hostility, however violent they might be. In *People v. Strong*, 30, Cal., 151, it is held that "it is for the jury in a criminal case to determine whether evidence introduced upon a given point amounts to proof of the fact sought to be proved." In *Whitley v. State*, 38 Ga., 50, it was held that "when the charge of the court assumes certain things as facts, and is in such shape as to intimate to the jury what the judge believes the evidence to be and that they made defendant guilty, a new trial will be granted." No. 2 is a proper instruction. "The court is not bound to give an instruction upon a mere abstract question, and if it does so, under circumstances calculated to mislead the jury, such an instruction will be error, for which the judgment will be reversed." 1 Bart. Law Prac., 656. In *Pasley v. English*, 10 Grat., 236, point 3, Syl., it is held "if an instruction is given, on an abstract

question, which may mislead the jury, it is error for which the judgment will be reversed." If the courts are so careful in relation to giving instructions which may mislead the jury in trying a case when only property rights are involved, how much greater reason for such care when human life is involved! Instruction No. 4 asked by the prisoner and rejected by the court, is as follows: "The court instructs the jury that if the State relies for a conviction in this case upon evidence in whole or in part circumstantial, then it is essential that the circumstances should, to a moral certainty actually exclude every hypothesis but the one proposed to be proved, and that unless they do, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved, then they should find the prisoner not guilty." This instruction seems to propound the law properly, and should have been given. While the purpose of the prisoner is better expressed in points 3 and 4 of the syllabus in *Flanagan's Case*, 26 W. Va., 116, yet in *Evans' Case*, 33 W. Va., 417, (10 S. E. 792), it is held that "a party has a right to have his instructions given in his own language, provided there are facts in evidence to support it; that it contains a correct statement of the law, and is not vague, irrelevant, obscure, ambiguous, or calculated to mislead." As to defendant's instruction No. 6, in the following words: "The court instructs the jury that when one without fault is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances, and, without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false,—that there was in fact neither design to do him some serious injury, nor danger that it would be done."

The court did not err in refusing to give the instruction without adding thereto the words, "but of all this the jury must judge from all the evidence and circumstances of the case," in which form said instruction No. 6 was given by the court. See *State v. Cuin*, 20 W. Va., 679; also *State v. Hobbs*, 37 W. Va., 812, (17 S. E. 380). Defendant's instruction No. 7, refused by the court, is as follows: "The court instructs the jury that, if the State uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another, and, if there be either no other evidence incompatible with it, the declaration so introduced in evidence must be taken as true. The court therefore further instructs the jury that unless they believe from the evidence in this case that there is other evidence, testified to by the witnesses, or from the circumstances in the case, incompatible with the confession of the prisoner in this case, then the declaration so adduced in evidence as a whole must be taken as true." If the confession of the prisoner had been introduced by the State, this instruction would be good, but being made by the prisoner as a witness upon the stand, offered by himself in his own behalf,—he being a competent witness,—his testimony goes to the jury for what they think it is worth. It is not in the province of the court to instruct the jury, in regard to the testimony of any witness, that they shall or shall not believe all or none, or any part, of the evidence given by such witness.

The prisoner's counsel admits that the eleventh assignment is without merit.

The twelfth assignment is that the court erred in pronouncing the death sentence upon the prisoner without having first asked him what, if anything, he had to say why the court should not proceed to pass the sentence of the law upon him. I think the order of the court made on the 27th day of March, 1897, fully answers this assignment, which order shows that: "The prisoner was set to the bar of the court in the custody of the sheriff of this county. And the court; after maturely considering the motion of the prisoner to set aside the verdict of the jury upon the grounds assigned, doth overrule said motion, and refuses to set aside the verdict of the jury and grant to

said prisoner a new trial. The court doth also overrule the motion in arrest of judgment. To the overruling of said motions the prisoner excepted, and asked that said exceptions be saved to him; the prisoner showing no further reasons why judgment should not be pronounced against him, and asking that the execution of such judgment as may be pronounced against him, should be postponed until a reasonable time after the first day of the next term of the supreme court of appeals of this State, to enable him to apply for a writ of error herein." The court then proceeded to render its judgment. It appears from the record that, after the coming in of the verdict, the prisoner moved the court to set aside the verdict and grant him a new trial, and moved in arrest of judgment, both of which motions were overruled in the presence of the prisoner. Then the order goes on to state that the prisoner gave no further reasons why judgment should not be pronounced against him, and asked that the execution of such judgment as might be pronounced against him should be postponed until after the first day of the next term of the Supreme Court. In 21 Am. & Eng. Enc. Law, 1071, it is stated that "although the presence of the defendant in court at the time of pronouncing sentence, and the inquiry of whether he has anything to say why sentence should not be pronounced, may be necessary to the validity of the sentence, an omission of these formalities, like a defect in the style of the sentence itself, will not be ground for a new trial, or the discharge of the prisoner, but the appellate court will remand the case, with instructions to render judgment according to law." I think it unnecessary further to discuss this assignment.

The thirteenth assignment goes to the jurisdiction of the court, claiming that the venue had not been proved. It is proved by all the witnesses who saw the deceased at the place where he was killed, including the prisoner himself, that the killing was at Road Branch Gap. And the witness Lafe Ellis, who saw the deceased at the place where he was killed, before his death, said he saw Dr. Harvey lying on his side; he seemed to be suffering. Witness remained there about ten minutes, went away and afterwards returned, and, when he got back, L. Godfrey and

two or three others were there. That the body of James Harvey Ferguson was still there. He was there dead. He says: "I did not notice from what direction he had come. I found him in Wyoming County, West Virginia." This is sufficient proof of the crime being committed in Wyoming County. In *Hobbs' Case*, 37 W. Va., 816, (17 S. E. 382), the Court quotes from Whart. Cr. Ev. § 108, with approval: "It is not necessary that witnesses should be produced to testify that the offense was committed in the place charged. It is enough if the proof be inferential." *State v. Poindexter*, 23 W. Va., 805. And in *Hobbs' Case*, *supra*, point 4, Syl., it is held: "It is not necessary that the proof should be direct that the crime was committed in the county charged. It is enough if the proof be inferential, but sufficient."

The fourteenth assignment, that the verdict in this case is manifestly contrary to the law and evidence therein, I deem it unnecessary to pass upon.

For the reasons herein given, the judgment is reversed. the verdict set aside, and a new trial awarded.

BRANNON, PRESIDENT, (*dissenting*):

In *Abbott's Case*, 8 W. Va., 741, this Court declared that "previous threats or acts of hostility, however violent they may be, will not justify a person in seeking and slaying his adversary;" and yet this Court now holds that a circuit court dare not say so to a jury. It must not use the language of the syllabus of this Court, declaring a proposition of law beyond all dispute, lest it intimate that it thought that there was evidence to prove that the prisoner sought the deceased to slay him. We may just as well say that if the court would give as an instruction section 1, chapter 144, Code, that "murder by poison, lying in wait, imprisonment or starving," is murder in the first degree, it would be error, as intimating the court's opinion that poison, lying in wait, imprisonment, or starving was the cause of death. Just as well say that a court cannot instruct that any willful, deliberate, or premeditated killing is murder in the first degree, without intimating the opinion that the killing under trial was such. Just as well say

that it cannot say that a homicide is *prima facie* murder in the second degree. Can a court never declare a correct legal proposition, relevant to the case, and then let the jury say whether it suits the case, under the evidence? What jury could be found so ignorant as not to understand that it was for it to consider the evidence, and say whether it showed a case falling under that legal principle? How, possibly, could this instruction mislead the jury? It was plainly revelant. If the evidence tended to show that Allen went to the lonely mountain gap, and there, lying in wait, shot Ferguson, did he not seek his victim to slay him? There was evidence to show that Allen, long before the killing, declared that he intended to kill Ferguson; that, just before the killing, Allen was seen going towards that gap, and shortly afterwards Ferguson was seen riding towards it,—Allen on foot, having a 32-caliber Winchester rifle; that tracks were found behind a tree in that gap,—the tree within shooting distance of the road, but obscured from it by bushes; that hulls of 32-caliber cartridges were found behind that tree; that Ferguson was found in the gap, pierced by a bullet, and dead, his horse near him, and and horse tracks showed that the horse had jumped aside,—frightened, likely, by the shot; that tracks like those behind the tree were found in a field near by, and down a point where Allen admitted he had passed. All these circumstances, and others which I need not now detail, tended to show that Allen, from sedate malice, sought Ferguson, and lay in wait to slay him. He admitted that he killed Ferguson, but said Ferguson was rushing on him to kill him; but no evidence save his showed this, and the jury found that he killed Ferguson by lying in wait for him in the lonely, secluded mountain pass. I cannot realize why such an instruction, relevant under such evidence, and correct in law, was improper. It is absolutely free from error, and plainly proper. If such an instruction cannot be given, better that the prosecution in every case abstain from all instructions as to the law of the case. The refusal of instruction 4 is no reversible error. I think it good, and that it should have been given, under principles which I stated in *Musgrave's Case*, 43 W. Va., 672, (28 S. E. 813); but instructions 2 and 3 given

at Allen's instance, and inserted below, covered the whole ground covered by said instruction, and show that he suffered no harm by its refusal. "Where instructions given clearly and fairly lay down the law of the case, it is not error to refuse other instructions on the same subject." *State v. Bingham*, 42 W. Va., 234, (24 S. E. 883). I do not recall a single case in the books where a conviction of the highest crime,—murder by lying in wait,—upon a fair trial, has been held for naught on such light grounds as in this case. The enforcement of the criminal law should not be frustrated, after fair trial, except for causes plainly hurtful to the rights of the accused. I cannot refrain from expressing my strong dissent from the judgment in this case.

Defendant's instruction No. 2: "The court instructs the jury that the law presumes the prisoner innocent, that this presumption goes with him through the whole trial, that the burden is upon the State is to prove his guilt to a moral certainty, and that neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of every reasonable doubt."

□ Defendant's instruction No. 3: "The court instructs the jury that, if the State relies for a conviction in this case upon circumstantial evidence, it is essential that all the circumstances from which the conclusion is to be drawn shall be established by full proof; and the State is bound to prove every single circumstance which is essential to the conclusion in the same manner, and to the same extent, as if the whole issue had rested upon the proof of each individual and essential circumstance; and such evidence is always insufficient, when, assuming all to be proved which the evidence tends to prove, some other hypothesis is may still be true, for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof."

Reversed.

CHARLESTON.

TURK v. SKILES *et al.*

Submitted January 25, 1898—Decided April 20, 1898.

45	88
46	439
45	88
48	322
45	82
49	189
45	82
51	89
52	189
52	338
52	340
45	82
56	222
45	82
59	248
59	250

1. VENDOR'S LIEN—*Discharge—Deed of Trust—Construction.*

The holder of a vendor's lien joins with the owner of the land charged with such lien in a deed of trust granting the land by the words, "grant, bargain, sell, and confirm," to a trustee in trust to secure a debt to a third party, and to pay the balance of proceeds of sale under it to the owner of the land owing the vendor's lien. Such deed of trust will discharge the vendor's lien as to both the debt secured by the deed of trust and the owner of the land. Such deed of trust is as to the owner of the land a grant, and as to the holder of the lien a confirmation. (p. 83).

2. VENDOR'S LIEN—*Deed of Trust—Construction.*

Such deed of trust, containing no words of limitation, operates, under section 8, chapter 71, Code, and section 1, chapter 72, *Id.*, to pass the whole estate or interest of the grantors in the land, including such lien, for the purposes specified in the deed of trust. (p. 84).

3. CHOSE IN ACTION—*Assignment.*

The first assignee of a chose in action has preference. (p. 85).

4. MERGER.

Where a greater and less estate unite in the same person, without intermediate estate, the less at once merges into the greater. (p. 88).

5. PURCHASER FOR VALUE.

A purchaser for value without notice, having obtained a conveyance, will not be affected by a latent equity by lien, incumbrance, trust, fraud or other claim. (p. 87).

Appeal from Circuit Court, Pocahontas County.

Action by R. S. Turk, trustee, against Jennie B. Skiles

and others. Defendants had judgment, and plaintiff Turk and defendant Tyree appeal.

Affirmed.

R. S. TURK, in proper person.

H. S. RUCKER, and FRANK WOODS, for appellees.

BRANNON, PRESIDENT:

This case was once before in this Court. 38 W. Va., 404, (18 S. E. 561). As there appears, Apperson conveyed land to Skiles, reserving a lien for deferred purchase money, for which Skiles made her bonds to Apperson, not mentioned in the deed. Afterwards, August 25, 1886, Mrs. Skiles and her husband and Apperson executed a trust deed to a trustee to secure a debt to Baldwin, recorded September 8, 1886. On September 7, 1886, Apperson assigned said bonds to Turk. Turk brought a chancery suit to enforce the lien to pay said bonds. A decree of sale was rendered, and sale made under it to Tyree, which decree was reversed and the sale set aside by this Court. Before the trustee or creditor under said deed of trust had been made parties, a sale was made under it, and the land conveyed to Durbin. The plaintiff filed an amended bill, making the trustee and creditor under said trust deed and Durbin parties, and the result was a decree holding that Turk had no lien, and dismissing his bill and Turk and Tyree appeal.

Has Turk a lien on which a suit to sell the land can rest? Apperson joined in the deed of trust to Baldwin. His only interest was the lien. He meant his deed to have some effect. It could pass nothing as to him but the lien, and thus subordinate his right to the purpose or trust declared in the deed. He joined in the deed only to release his lien. Can he set up the lien against that deed, in the teeth of his deed? He had an interest not technically in the land, but an incumbrance or debt to come out of it, and, granting the land, did he not grant that lien? An estoppel arises out of the contract, treated simply as such. Bigelow, Estop. 422. At common law a grant was used to pass incorporeal rights or estates, and it passed just what the grantor at the time had, and all of it, not that

afterwards acquired, unless it had a clause of warranty. Statute law having made it applicable to corporeal property, it has now *per se*, without warranty, force to pass such title or right as the grantor at the time has in the land. *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.*, 8 W. Va., 411; 4 Kent, Comm., 490; 2 Lomax, Dig., 82. Code, chapter 72, gives to the form of deed found in section 1 capacity to pass "the grantor's whole interest" in the thing granted. The operative word in it is "grant." The deed here involved is, it is true, not one of absolute grant, but of trust; but it is an absolute grant in trust, and has the same operative word "grant," and I do not see why it should not as well pass the grantor's whole interest, for the purposes of the trust; and section 8, chapter 71, Code, provides that "where any real estate is conveyed, devised or granted to any person without any words of limitation, such devise, conveyance or grant shall be construed to pass the fee simple, or the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear." There is no warranty in this deed; but that is immaterial, as the deed passes all the interest the grantors had in the subject. A quitclaim deed from mortgagee to mortgagor discharges the mortgage. 1 Jones, Mortg. § 859. Why will not such a deed to a second mortgagee do so? A deed is taken most strongly against the grantor.

There is another view adding force to the contention that the lien passed to the trustee. By the deed of trust the granting parties, including Apperson, "do grant, bargain, sell and confirm" unto the trustee the land. Here is the word "confirm." It has a legal force under the law of conveyances. "A confirmation is of a nature similar to a release. Lord Coke defines it to be: 'A conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or a particular estate increased.'" 2 Lomax, Dig., 101; 2 Tuck. Comm., 253. To make sure a voidable estate is the proper office of confirmation. 2 Minor, Inst., 717. Apply this law to this case. Mrs. Skiles owns the land, but subject to Apperson's lien, which lessens and endangers her ownership

and the security which a deed of trust from her alone would confer; but Apperson joins in such deed of trust, saying that he will confirm the land to the trustee to answer the purposes of the trust. Does he not thereby confirm the security of the deed of trust against his lien, and does he not make a voidable estate sure and unavoidable as against that lien? Parsons, in his second volume on Contracts (page 504), pointedly answers in the affirmative by stating as the law that, "if a mortgagor and mortgagee, join, it is the grant of the mortgagee, and the confirmation of the mortgagor." Mrs. Skiles is the mortgagor, and Apperson the mortgagee, under this rule. So, in effect, they are treated by the courts. *Hull's Adm'r v. Hull's Heirs*, 35 W. Va., 165, (13 S. E. 49); *Armentrout's Ex'rs v. Gibbons*, 30 Grat., 632; *Coles v. Withers*, 33 Grat., 194.

The deed retaining the vendor's lien mentioned no bonds for it, and the beneficiary under the trust deed is a purchaser for value without notice of the bonds. *Bank v. Harman*, 75 Va., 604. I hardly think, however, that view important, for at the date of the trust Apperson yet owned the notes. Here are purchasers for value,—Baldwin, creditor, and Baldwin trustee. They have the first assignment in time. I have always understood that it was a bed-rock principle of equity that it would not disturb a purchaser for valuable consideration without notice, though he be junior to the adverse claimant; but here the proposition is to take from such a purchaser who is prior in time. How can this be done? The well-considered case of *Bank v. Harman*, 75 Va., 604, is decisive authority on this principle in favor of Baldwin, though Baldwin has a stronger case than had O'Toole in that case, because here Baldwin is first in time. In that case Harman, Sr., sold to Harman, Jr., a house and lot, making a deed and reserving a lien for purchase money, but not mentioning the existence of any note for it, just as in this case. Harman, Sr., took a note for the purchase money, and transferred it to the bank. Then Harman, Sr., made a contract selling the house to O'Toole, and Harman, Jr., made O'Toole a deed. The question was whether the bank, as assignee of the note, could enforce the lien; whether, as

Harman, Sr., the person in whose favor the deed retained the lien (like Apperson here), having made the contract selling the lot to O'Toole, all his right did not pass to O'Toole shutting out the bank, occupying the shoes of Turk in this case, though Harman, Sr., did not sign the deed to O'Toole, whereas here Apperson joined in this deed of trust; making it stronger in favor of Baldwin in this case. The court held O'Toole protected from the note and lien. O'Toole did not know of the assignment of the note to the bank. The deed reserving the lien did not mention it. If it had there might be some pretense to say that she ought to have inquired. I ask here, where is the evidence that Baldwin knew a thing of these bonds assigned to Turk? The deed did not hint of their existence. But suppose the deed had spoken of them. They were yet owned by Apperson when he made the trust. He had not yet assigned them to Turk. In the case cited it is said: "I think it has been decided that against a purchaser for valuable consideration without notice this court will not take the least step imaginable. * * * I am pretty sure it is determined that no advantage the law gives him will be taken from him." Here it is proposed to take from Baldwin the advantage even the law gives him,—priority in time of assignment. But, even if he were later than Turk in time, you could not charge his lot with the bond lien, under the case above cited. But Baldwin is an earlier purchaser than Turk. Equity and law both say that he who is prior in time is prior in right.

It will not do to say that the lien cannot be assigned without actual delivery of the notes. A separate instrument may assign a debt and its lien. *Spring v. Insurance Co.*, 8 Wheat., 268; 2 Am. & Eng. Enc. Law, 1056. The lien is one thing,—a charge on the land; the note another,—a mere evidence of personal demand. *Bowie v. Poor School Soc.*, 75 Va., 300, 303. True, when bonds are assigned they carry the lien; but if, before they are assigned, a separate paper has operated to assign the debt and lien, it is ineffectual. This deed did not hint at any bonds for purchase money. 2 Jones, Liens, § 1121, says: "If the deed which retains a lien for purchase money does not refer to any note or bond for such purchase money, a sub-

sequent purchaser is not bound to make inquiry for it, and is not affected by any equity in favor of the assignee of the note or bond. * * * The assignee of the note in such case does not stand upon the same ground with the assignee of a mortgage note, where the latter is described in the mortgage. The giving of a note for the purchase money, secured by a vendor's lien, is not so universal a practice as to make it incumbent upon a subpurchaser, in the absence of any reference to the note in the deed, to make inquiry for such a note. And so, where a note given in consideration of a contract for the conveyance of land was transferred to a third person, and the contract was afterwards canceled by the parties to it, and the land conveyed to others, it was held that the holder of the note had no lien upon the property." Turk's equity, besides being later, is a latent one, and the creditor under the trust a purchaser for value, and "a purchaser for value, without notice, having obtained a conveyance, will not be affected by a latent equity, by lien or encumbrance, or trust or fraud, or any other claim." *Carter v. Allan*, 21 Grat., 241; Bart. Ch. Prac., 1008.

The fact that the trust deed was not recorded until after the assignment of the bonds to Turk is irrelevant. A transfer or discharge of a lien for purchase money need not be recorded to bind a subsequent assignee, it being good as to him though he have no notice of the transfer or discharge, however necessary notice to the debtor may be. *Tingle v. Fisher*, 20 W. Va., 498; *Fleshman v. Hoylman*, 27 W. Va., 728. If we view the instrument as a deed of trust, conveying, not only the land, but the debt or chose, it need not as to the chose be recorded to bind subsequent purchasers or assignees of the chose; for the words "goods and chattels" in section 5, chapter 74, Code, requiring deeds of trust of goods and chattels to be recorded, does not apply to choses in action, but only to visible, tangible, movable personal property. Cases just cited. And the trustee under the trust might have the lien, and Turk the bonds, their personal obligation, as they are for certain purposes separate. The trustee and creditor under the deed of trust are purchasers for value. *Weinberg v. Rempe*, 15 W. Va., 831; *Duncan v. Custard*, 24

W. Va., 731. They are, under said deed, assignees of the lien first in time over Turk, and take preference over him, and gave first notice of assignment to debtor, and before Turk's assignment; but notice is not at all material. *Tingle v. Fisher*, 20 W. Va., 498. Thus, I think Baldwin has preference over Turk's vendor's lien.

Next comes the question, has Turk a vendor's lien as against Mrs. Skiles? I think not, because the deed of trust conveys the land upon three trusts specified in it, namely: (1) Out of the proceeds of sale in default of payment to pay costs of executing the trust; (2) to pay Baldwin's debt; (3) to pay the balance to Mrs. Skiles,—this third purpose of trust operating to discharge the lien as to Mrs. Skiles whether under the doctrine of release, merger, or estoppel a court of equity, in its desire to execute the intent, will not be particular in saying. Apperson had a money demand charged on the land. His deed, importing by its seal consideration, directs that money to go to Mrs. Skiles. Can he or his assignee claim it against that deed? And here is a union in one person, Mrs. Skiles, of the land and the charge. Is not this a merger of the debt? "All inferior estates are derived out of the fee simple, so that whenever a particular estate, or limited interest in land, vests in the person who has the fee simple in land, such particular estate or interest is immediately drowned or merged in it, upon the principle that *omne majus continet in se minus*. Where a sum of money is charged on real estate, which comes to the person entitled to the money in fee, the charge is merged." 1 Lomax, Dig., 13. The same result follows where the right to money charged on the land comes to the owner in fee of the land. A quitclaim deed from mortgagee to mortgagor releases the debt. 1 Jones, Mortg. § 972. "The strict rule of law is that, when the ownership of the mortgage debt and title to the land become vested in the same person, the mortgage is thereby merged and extinguished." "The union of title to property, and the ownership of a judgment which is a specific lien on the particular property, in the same person, will merge and extinguish the judgment." 15 Am. & Eng. Enc. Law, 321, 334. "When a greater and less estate meet in the same person, without intermediate

estate, the less at once merges in the greater." *James v. Morey*, 14 Am. Dec., 475. Conveyance by mortgagee is an assignment of the mortgage, and passes mortgagee's interest. *Hunt v. Hunt*, 25 Am. Dec., 410. As a plain matter of intent, did not Apperson design what we would call in common parlance a "release" of the lien to Mrs. Skiles? He could not, by assignment to Turk, afterwards retract this act working the merger or release, and revive the lien. It would not do to say that a release of a lien must be recorded. Code, chapter 76, says it may be recorded, but does not, as in the case of the statute requiring deeds to be recorded, render it null if not recorded. It is merely a recorded receipt, designed to manifest by record the cessation of a lien of record, and its more particular office is to revest title, which it was doubtful whether mere payment would do before that act, in cases of mortgages and deeds of trust. To show that this position is correct, see the declaration of section 7, that the chapter shall not impair any deed of release or writing discharging any lien executed before or after that chapter's enactment. So far from declaring the release void if not recorded, it declares it still operative though not recorded. It only adds strength to all this to say that Durbin became purchaser under a sale under the deed of trust, before the trustee was made a party, and has a deed and is a purchaser for value, not to be disturbed by a court of equity.

A question, then, arises whether, though there is no vendor's lien, there is a debt arising from the bonds given by Mrs. Skiles creating a debt which a court of equity may charge on this land as Mrs. Skiles' separate estate, as in the ordinary case of a married woman's debt, on the principle that the lien and bond are distinct things, that though the lien be gone by release, the debt yet exists. *Smith v. Railroad Co.*, 33 Grat., 621; 3 Pars. Cont., 99. But this would seem unreasonable,—to say that it was the intent of Apperson to release the land from the lien, and then turn around and hold this same land liable to the same debt, thus allowing the theory of the separate existence of the debt to overrule the intention of the parties.

Next, as to title of the purchaser. The title of the purchaser, Tyree, having fallen with the reversal of the

former decree, he cannot be reimbursed, if he has paid, to the prejudice of the creditor and Mrs. Skiles, as his money did not go to pay liens having precedence over them; but he is entitled to be placed in *statu quo* by having his money, so far as paid, repaid by the commissioner, and any purchase-money notes given by Tyree canceled. Decree affirmed.

Affirmed.

CHARLESTON.

BODKIN *et al.* v. ARNOLD.

(BRANNON, PRESIDENT, *absent.*)

(ENGLISH, JUDGE, *dissenting.*)

Submitted June 14, 1897—Decided April 22, 1898.

1. RES ADJUDICATA—*Decree—Review on Appeal.*

When a decree is entered reserving the right to any party to further litigate any matter in controversy in the suit, such reservation may be reviewed on appeal by any party prejudiced thereby, and if no appeal is taken, such reservation becomes *res adjudicata*, and cannot be called in question by any party in any other suit or proceeding. (p. 97).

2. DECREE.

A decree is conclusive, as to the existence or nonexistence of every fact on which it depends, upon the parties to the suit and those claiming through them. (p. 98).

45	90
46	16
45	91
48	109
48	487
45	90
57	203

3. LANDLORD AND TENANT—*Lease—Estoppel.*

Where a person claiming title takes a lease of the same land under a different title, in the absence of fraud or mistake, he is estopped to deny his landlord's title or possession. (p. 103).

4. ADVERSE TITLE—*Estoppel.*

If a person owning an adverse title to land represents such title as bad and the title of another as good, and advises innocent persons to purchase under the latter title, and they do so by reason of his representations, he, and those claiming under him, will be estopped from setting up his title adversely to such purchasers, whether it be good or bad. (p. 104).

Error to Circuit Court, Braxton County.

Action by George Bodkin and others against George J. Arnold in ejectment. From an order setting aside a verdict for plaintiffs and granting a new trial, they bring error.

Reversed.

DAYTON & DAYTON and MORRISON CORLEY, for plaintiffs in error.

GEO. J. ARNOLD and W. E. HAYMOND, for defendant in error.

DENT, JUDGE:

On the 23d day of September, 1890, a jury rendered a verdict in favor of George Bodkin and John P. Bodkin, plaintiffs, in an action of ejectment instituted in the circuit court of Braxton County, against George J. Arnold, defendant. On his motion the circuit court set aside the verdict, and awarded the defendant a new trial. Plaintiffs obtained a writ of error to this Court. The following is a statement of the case and the errors assigned adopted from the petition:

"On the 8th day of September, 1824, Daniel Stringer secured a patent on two thousand acres of land in what was then Lewis County, now Braxton County. On September 25, 1828, he conveyed this land to Camden & Porter, trustees, to secure certain debts. On December 1, 1834, Camden, trustee, sold this land to Samuel Merchant, and conveyed it to him on the 9th day of November, 1839. Merchant appointed Camden his agent, and as such agent,

on the 13th day of April, 1843, Camden leased the land to Andrew Boggs, Sr., for three years. Other leases were made under this Merchant title, one to Thomas Roby, and it is insisted one was made to David Alkire, in 1849, or 1850, from Camden, as agent for Merchant. While in possession of said land as Merchant's tenant, the said David Alkire, without notice of attornment to his landlord, on July 2, 1854, entered 786 acres of this 2,000-acre tract as vacant land. Survey was made October 11, 1855, by him, and on July 1, 1856, he obtained a patent for this 786 acres, and continued to reside on it, he and his sons and son-in-law, until about 1859, when he conveyed, by deed dated December 5, 1859, said 786 acres to Andrew Boggs, Jr., but, knowing that such title was defective, Boggs, Jr., did not have his Alkire deed recorded, and in the fall of 1860, took from Camden, agent for Merchant, a lease for the whole 2,000-acre tract, which included this 786 acres, for a period of two years, and remained in possession under said lease until the 6th day of September, 1865, when he attempted to convey the 786 acres under the Alkire patent to petitioner George Bodkin and N. G. Mundy in exchange for a tract of 725 acres in Upshur County, which they by written contract agreed to convey to him, and petitioner George Bodkin was put in possession of the 786-acre tract in Braxton. Shortly after, Camden, as agent for Merchant, demanded of petitioner George Bodkin to quit the possession of said land or become Merchant's tenant. Petitioner George Bodkin refused to surrender, and thereupon suit was instituted in ejectment in the United States district court of the state by Merchant, a nonresident, to recover such possession. After notice was served, petitioner George Bodkin and said N. G. Mundy, in the spring of 1870, met Boggs, Jr., on this land in Braxton, called his attention to the suit of Merchant's, and asked him to defend the same. This he absolutely refused to do, admitting that his title to the land was not good, and that the Merchant title was the better one, and he advised petitioner George Bodkin and Mundy to make the best compromise they could with Camden, agent for Merchant, characterizing his own title as 'not worth a damn,' and it was thereupon agreed that the exchange of

this 786 acres for the 725 acres in Upshur should be rescinded, and that petitioner George Bodkin should give to Boggs, Jr., a horse valued at \$105 to pay him his expenses in moving to and from said 725-acre tract in Upshur. He did move off, and petitioner George Bodkin did give him the horse. The defense of the ejectment in the federal court was abandoned, and the said N. G. Mundy, on behalf of himself and the petitioner George Bodkin, his father-in-law, purchased and took conveyance on October 20, 1870, of this tract of 786 acres, from Camden, attorney in fact for Merchant. In the deed to Bodkin and Mundy from Boggs, Jr., for the 786 acres of land, Boggs, Jr., reserved a lien on it to indemnify him for any liens against or defects of title to the 725 acres gotten by him in the exchange. In the spring of 1876, William H. Boggs secured from Boggs, Jr., some kind of an assignment by parol contract of this lien, and in February, 1881, suit was instituted in chancery in the name of said William H. Boggs against petitioner George Bodkin and M. G. Mundy, and the administrator, widow, and heirs of Boggs, Jr., to compel said Bodkin and Mundy to have said contract, by their election, whereby said exchange of lands was made, either rescinded or specifically performed on their part; and in the bill and three amended bills filed in the cause the facts are set forth in minute detail, substantially as given above. In the meantime, the said N. G. Mundy, by deed dated June 9, 1877, had conveyed to petitioners, George Bodkin and John P. Bodkin, jointly, his half interest in the land, and said petitioners answered said bills in said chancery cause, setting forth the verbal rescission of the contract of the exchange with Boggs, Jr., and the purchase by them afterwards, of the Merchant title, and that they were holding under said Merchant title; and insisting that, inasmuch as the contract had long since been rescinded, it could not be specifically enforced, and that the bills should be dismissed. On May 3, 1887, a decree was entered in the circuit court of Braxton County in said chancery cause, which adjudged that the plaintiff William H. Boggs therein was entitled to a rescission of the contract of exchange made by his father, Boggs, Jr., and Bodkin and Mundy, and to a cancellation of the deed made by said

Boggs, Jr., to them, and further giving a writ of possession to him against petitioners for the possession of the 786 acres, and awarding costs against them in favor of the said plaintiff. But to this decree this express reservation is made: 'But it is provided that this decree shall not prejudice the right of the said defendants Bodkin to assert or maintain their right and title, if any they have, to the 786 acres of land aforesaid, derived by them or either of them from or under Samuel Merchant, in any suit or proceeding in which it may be involved.' From this decree an appeal was taken by petitioners to this Court, and on the 27th day of June, 1889, it was affirmed. See *Boggs v. Bodkin*, 32 W. Va., 566, (9. S. E. 891). Under and by virtue of the express reservation in said degree permitting petitioners to assert their right under the Merchant title, which had been purchased by them, they, as soon as deprived of possession under said decree, instituted this action of ejectment against the defendant George J. Arnold, to whom it had been conveyed by the said William H. Boggs almost immediately after the decision of this Court was rendered, and Edward Watson, his tenant. Petitioners' declaration was filed at the August term, 1890. A motion was made to quash the notice by the defendant at the same term. Issue was made by plea in vacation; again, on the 24th of November, 1890, in court; and also on the 7th day of January, 1892, in court. On said last day a jury was impaneled, to which the evidence was submitted, and a partial argument of the case was made by counsel, and various instructions were asked by petitioners; but the court, having reached the conclusion that petitioners' right under said Merchant title was adjudicated, notwithstanding said reservation by the decree in said chancery cause, cut short the argument of counsel, refused to give any of the instructions asked by petitioners, and gave an instruction for the defendant substantially directing the jury to find for the defendant because of said adjudication aforesaid. In this condition the jury were sent to their room, and soon returned with a verdict for the plaintiffs in said action, whereby they found for petitioners, by metes and bounds, the seven hundred and eighty-six acres of land; and thereupon, on the 13th day of

January, 1892, the said court below rendered the judgment complained of, and set aside said verdict on motion of said defendant, and granted him a new trial; to which action of the court plaintiffs filed their bill of exceptions, and had the facts certified. The defendant, after the said verdict was set aside, on his part filed some fourteen bills of exception to rulings of the court made in said trial, and caused them to be made part of the record. Plaintiffs assign the following errors to their prejudice: First. It was error to refuse to give to the jury the seven several instructions asked for by petitioners, and set forth in petitioners' first bill of exceptions. Second. It was clear error on the part of the court below to give on behalf of the defendant the instructions set forth in petitioners' second bill of exceptions, holding an adjudication of the Merchant title by said decree in said chancery cause, in the face of said decree's express reservation that it was not so adjudicated. Third. It was error for the court below to refuse to admit the record of the Stringer patent as set forth in bill of exceptions No. 3. Fourth. It was clear error for the court below, upon the evidence and the law, to set aside the verdict found by the jury in favor of your petitioners, and award to the defendant a new trial, and your petitioners earnestly insist that they are entitled to have said order set aside and judgment rendered by this Court upon said verdict for the said land."

This is, without material difference, the same statement of the case made by JUDGE GREEN, in delivering the opinion of the court in the case of *Boggs v. Bodkin*, 32 W. Va., 566, (9 S. E. 891), except some additional matters are added, including the assignment of errors.

The errors in the first, second, and third assignments are not proper for the consideration of the Court on a motion to enter up a judgment on the verdict of the jury, as they proved to be harmless error; but they would have been proper on a motion to set aside the verdict, if it had been for the defendant.

The last assignment, being for the error of the court in setting aside the verdict of the jury, raises the real merits of the controversy, being the question of *res adjudicata*. The defendant insisted that the decree in the case of

Boggs v. Bodkin was a final adjudication of the matters at issue in this action, and that the reservation of rights in said decree was *coram non judice*, and therefore void, and the circuit court so instructed the jury, but it disregarded the instruction, and found for the plaintiffs. The law of *res adjudicata* is laid down in the case of *Rogers v. Rogers*, 37 W. Va., 407, (16 S. E. 633): "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res adjudicata*." *Bank v. Hays*, 37 W. Va., 476, (16 S. E. 561); *Sayre's Adm'r v. Harpold*, 33 W. Va., 553, (11 S. E. 16). It must be an adjudication on the merits. The dismissal of a suit without prejudice, or for want of jurisdiction, or any other cause that does not determine the questions raised by the pleadings, is not an estoppel. *Wanzer v. Self*, 30 Ohio St., 378; *Lang v. Waring*, 60 Am. Dec., 533; *Crews v. Cleghorn*, 13 Ind., 438; *Thurston v. Thurston*, 99 Mass. 39. "Accordingly, it is the general practice in this country, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification, in a proper case, will be corrected on appeal." *Durant v. Essex Co.*, 7 Wall., 109. "When a decree on its face appears to be a dismissal on its merits, and the court has not considered the merits, it on appeal will be reversed, and the case will be remanded, with directions to the lower court to enter a decree dismissing the bill without prejudice to the plaintiff to bring any proper suit." *Miles v. Caldwell*, 2 Wall., 45; *Hughes v. U. S.*, 4 Wall., 232; *Barney v. City of Baltimore*, 6 Wall., 289. In this Court, without remanding, the decree would be corrected. *Van Dorn v. Lewis Co. Ct.*, 38 W. Va., 267, (18 S. E. 579).

The same rule applies to a defendant who sets up affirmative matter in defense of a suit against him. If the court dismisses him as to such matter without prejudice, it is not an adjudication on the merits, so far as such defense is concerned, and he has the right to institute any necessary suit to obtain such adjudication. And if the court decides such cause without considering the affirmative matter, and without preserving his rights as to the same, he may appeal, and have the decree reversed for this cause alone. And if the court does consider the case on the merits, and finally determines it, and yet reserves a right to either party to continue the litigation in a different form, this would be appealable matter, which would be corrected, on appeal by the party prejudiced thereby. And if the party in the latter case fails to appeal, he is bound by the reservation in the decree, even though it should be erroneous, as it is an adjudication by the court that for some reason it has not jurisdiction of the matter reserved to the defendant and therefore sends him to another and different tribunal. When a court decides a jurisdictional question, either for or against the right, its decision is reviewable; but, if the party prejudiced thereby fails to have such decision reversed, it becomes *res adjudicata* as to him, and he can never afterwards be heard to say that it is erroneous.

In the case of *Adams v. Alkire*, 20 W. Va., 486, JUDGE SNYDER says: "Nor can said deed be relied on as an estoppel against the defendants in said suit, because the decree directing the deed to be made expressly orders that it shall be without prejudice to any title or claim of the defendants to said land." And in the case of *Thorn v. Phares*, 35 W. Va., 771, (14 S. E. 399). JUDGE HOLT, says: "The court, under our statute, could and ought to have settled this controversy, but for some good reason the court declined to do so, and closed the decree as follows: 'And this decree is to be without prejudice to the right and title of George Thorn to all or any part of the three hundred acres herein allotted the said William Phares, and in any controversy therefor that may properly be had between the said claimants.' In this state of facts, to take away a man's ownership of land, * * * who

never had his day in court, except in a suit in which his right and title is expressly saved to him, and to be without prejudice who is in visible ownership, yet comes promptly into the proper court seeking the right thus saved, such a denial, if well founded, must be based upon some fact of rare occurrence."

In the suit of *Boggs v. Bodkin* the following reservation was made: "Provided, that this decree shall not prejudice the right of the said defendants Bodkin to assert or maintain their right and title, if any they have, to the 786 acres of land aforesaid, derived by them, or either of them, from or under Samuel Merchant, in any suit or proceeding in which it may be involved." This reservation was made, no doubt, under the law that a court of equity will not settle titles to lands. *Cresap v. Kemble*, 26 W. Va., 603. But, whatever may have been the reason, it plainly shows that the cause, as to the then defendants' (now plaintiffs') title, under Samuel Merchant, was not determined on the merits, and therefore is no adjudication, and cannot be pleaded in bar to any other suit which it is involved. If the plaintiff in said chancery cause was aggrieved by this reservation, he had the right to have had it reviewed on appeal, and the defendants, if they had considered themselves aggrieved by the reservation, and that their title was established beyond dispute or controversy, had the right to have had the same corrected on appeal; but, on looking at their petition for appeal, we find that they made no special point as to the reservation being prejudicial to them, and, if they did, the Court of Appeals affirmed the decree, thus affirming the action of the circuit court in declining to pass on defendants' title, and reserving their right to future litigation, and thereby this reservation became *res adjudicata*, and cannot now be questioned by the then plaintiff and those claiming under him, even though the decree and its subsequent affirmation may have been erroneous. The defendant in his brief says: "It must be conceded that the court settled some point in entering a decree rescinding the contract of exchange made with Bodkin and Mundy by Boggs, and cancelling the deed." This is undoubtedly true, and it devolves upon us to ascertain what points were settled.

In Herm. Estop. § 279, we find it laid down that, "in order that a decree in one suit shall be conclusive in another, it must appear with reasonable certainty that the question in the record was litigated and decided in the first." And in Freem. Judgm. § 257: "Every point which has been either expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment or decree, is concluded." "If a judgment necessarily determines a particular fact, that determination is conclusive, and in all subsequent actions between the same parties requires the same fact to be determined the same way." To ascertain what points or facts are determined by the judgment or decree, as the rule applies to both alike, and which are concluded thereby, we must resort to the record, the opinion of the court, and sometimes to parol testimony. Freem. Judgm. § § 272-275.

The plaintiff in the chancery cause of *Boggs v. Bodkin* prayed for the enforcement or rescission of a certain contract of exchange, and in the latter case for the cancellation of a certain deed. Defendants denied the right of enforcement or specific execution, because the grantor in the controverted deed had not title to the land at the time of the conveyance, but held under lease from a different title, under which defendants then claimed. On consideration, the circuit court decreed that "the court being of opinion that the plaintiff is entitled to a rescission of the contract of exchange of lands made by Andrew Boggs with George Bodkin and N. G. Mundy, whereby the said Andrew Boggs exchanged 786 acres of land in the bill mentioned for 725 acres of land in the bill mentioned, and to a cancellation of the deed made by the said Andrew Boggs to the defendants George Bodkin and Nimrod G. Mundy, dated the 6th day of September, 1865, it is therefore adjudged, ordered, and decreed that the contract of exchange and deed aforesaid be, and are hereby, rescinded, canceled, and annulled, and that the defendants George Bodkin and John P. Bodkin do surrender to plaintiff the possession of the 786 acres of land described in the said deed, and a writ of possession is awarded the plaintiff to cause him to have possession thereof." This was

the conclusion of the circuit court that the contract ought not to be specifically enforced, but should be rescinded, which, on appeal, was affirmed.

In arriving at this conclusion certain points at issue had to be determined by the court, and they then became *res adjudicata*. Turning to the opinion of the Court as announced by JUDGE GREEN, we find he says: "Yet in 1860 said Andrew Boggs took a lease of the whole 2,000-acre tract, including this 786 acres which had been patented to David Alkire, from Samuel Merchant, claiming under the Stringer title; and if he had any adverse possession under the Alkire title, which commenced in 1854, this hostile possession was broken up by his claim as lessee under the Stringer title in 1860 and afterwards." Further down on the same page he says: "This title, if not actually worthless, was at least so regarded by himself, and they (the defendants) ought not to be compelled to run the risk of having this 786-acre tract, when it appears that said Andrew Boggs, who ought to know the character of his title, obviously regarded this risk as so great that he thought the loss of it by them almost a certainty." These extracts show the manner in which the court reached the conclusion not to specifically perform, but to rescind, the contract, and the points decided by them in so doing. These points, at least, were determined by them: (1) That Andrew Boggs' possession at the time he executed the deed sought to be canceled was under the Merchant lease or title. (2) That his own or Alkire's title was worthless, and so regarded by himself. (3) That in restoring him to possession it was to the possession held under the Merchant lease. Under section 7, chapter 71, Code, the only interest that the grantees took by virtue of the deed from Andrew Boggs was his right to possession under the Merchant lease, which was the only right or interest in said real estate which the grantor "could lawfully convey or assure;" and the court, in canceling the deed, could only restore him to the right or interest that passed thereby. (4) And that, so far as the Merchant title was drawn in question by the pleadings, it was fully recognized and established beyond controversy.

The reservation in the decree is not that the validity of

the Merchant title may be ever drawn in question, but that the defendants' rights which they assert as to having purchased the Merchant title may be further litigated. It is their ownership under, and not the Merchant title itself, that is the subject of the reservation.

The only question in issue left undisposed of by the decree was whether the plaintiff or defendants were entitled to possession under the Merchant title, and the court restored this possession to the plaintiff, but reserved to the defendants the right to further litigate this issue; and in restoring the plaintiff to possession as the tenant of Merchant, if defendants should thereafter establish that they were the lawful owners of the Merchant title, thereupon they would become the landlords and plaintiff their tenant. That these were the adjudications of the court is beyond all question, and we cannot inquire into their wisdom or legality, but we are bound by them as questions forever at rest, and not open to future litigation between the parties or those in privity with or claiming under them. Such being the truth, there can be no hesitation in holding that the circuit court erred in giving the instruction asked by the defendant in this present ejectment suit, and also erred in setting aside the verdict of the jury, if there were no other grounds for so doing, which remains for us to inquire.

The defendant reserved a large number of exceptions during the progress of the trial, none of which is it necessary to specially notice, if the undisputed facts and legitimate evidence sustain the verdict of the jury. As soon as the plaintiff in the chancery cause, or those claiming under him, were restored to possession of the property in controversy, they began, in dereliction of the rights of their landlord, to assert and set up an adverse possession under the Alkire title, and thereby terminated the tenancy, and gave the landlord the right to demand a restoration of the possession. Plaintiffs then instituted this action of ejectment against this defendant in possession and claiming adversely. It is now the settled law in this State that it is only necessary for the plaintiff, to maintain the issue on his part, to show that he had exclusive possession of the property in controversy for the period of ten years under

color of title at the time he was dispossessed thereof by the defendant. *Swann v. Thayer*, 36 W. Va., 46, (14 S. E. 423); *Ketchum v. Spurlock*, 34 W. Va., 597, (12 S. E. 832); *Duff v. Good*, 24 W. Va., 682; *Core v. Faubel*, 24 W. Va., 238. The plaintiffs complied with this law by producing in evidence the deed from G. D. Camden, agent for Samuel Merchant, to N. G. Mundy, dated the 20th of October, 1870, and the deed from N. G. Mundy to John P. Bodkin, dated 29th October, 1880, and deed from said Mundy to George Bodkin and John P. Bodkin, dated 9th of June, 1870, and having exclusive possession of the land under the Merchant deed from the time it was executed up until the time they were dispossessed, a period of over fifteen years. This fully established the plaintiffs' right to recover, and it then devolved on the defendant to prove a better title, and at the same time show that the plaintiffs' possession was not adverse, actual, visible, continuous, and exclusive, as to the title on which the defendant relies.

The defendant, to establish this on his part, introduced in evidence : (1) An entry of this same land by David Alkire, 22d July, 1854, and also plat and certificate of survey made 11th October, 1855; also grant from the commonwealth of Virginia, dated 1st July, 1856; also deed from F. W. Holden and others to W. H. Boggs, October 4, 1884; also a deed from W. H. Boggs and others to defendant, dated 3d December, 1887. These were to establish a better title. Then, to destroy the plaintiffs' adverse possession, he introduced the deed from Andrew Boggs, Jr., to George Bodkin and N. G. Mundy, dated 6th September, 1865 for said land; also portions of the record in the chancery cause of William H. Boggs against George Bodkin and others; also a certificate of the auditor showing seven hundred and eighty-six acres of land assessed on the land books of Braxton County for the year 1872, and for the year 1873, which was returned as "improperly charged," and afterwards returned delinquent for the non-payment of taxes, and sold and purchased for the State; also record of the ejectment suit of Samuel Merchant against George Bodkin, in the United States district court at Clarksburg, by which record it was shown that suit was begun on the 16th day of September, 1869; on the 1st day of April, 1870,

defendant appeared and pleaded not guilty; on the 12th day of April, 1886, sixteen years thereafter, William H. Boggs had his name substituted as a defendant in place of George Bodkin, and on the 6th day of April, 1887, had the case dismissed for want of security for costs.

The defendant claimed that George Bodkin and Nimrod G. Mundy took possession of the land under the deed from Andrew Boggs, Jr., to them, dated the 6th day of September, 1865, and that they have ever since held such possession under said deed, and, the Alkire title belonging to defendant, their possession could not be adverse to it. The plaintiffs, to rebut this, show that Andrew Boggs, Jr., took a lease for this land from Samuel Merchant through his agent, G. Camden, in the year 1860, and that after he deeded the land to George Bodkin and Nimrod G. Mundy, and Samuel Merchant brought his suit in ejectment against them in 1869, they notified Andrew Boggs, Jr., of that fact, and required him to defend it. He then admitted that his title was bad, refused to defend the suit, the contract between them was canceled, and he advised them to buy of Merchant; that, acting on his advice and admissions, they did buy of Merchant, and took the deed from Camden to Mundy of the 20th of October, 1870. The plaintiffs insist that the defendant is estopped from setting up the Alkire title (1) by the lease taken under the Merchant title by Andrew Boggs, Jr., in 1860; (2) by his conduct in refusing to defend the ejectment suit, and admitting that his title was bad, and that Merchant's was good, and advising his grantees to buy of Merchant. There are some other questions urged, reaching further back in time, but, if plaintiffs are right in either of the two propositions above, it is not necessary to examine into matters so remote from the real controversy.

The law is that, if one claiming title to land takes a lease of the same under a different title, he cannot afterwards deny his landlord's title, although he continues to hold over after his lease expires, unless his landlord have notice of an adverse claim by some act open and notorious. *Tayl. Landl. & Ten.* § § 89, 705-707; *Wilcher v. Robertson*, 78 Va., 602; *Campbell v. Fetterman*, 20 W. Va., 398. "It is only where there is fraud or mistake in consequence of which

he takes a lease of his own land that he will be estopped to show this on termination of the lease." "Possession of the tenant is possession of the landlord. Therefore, where the relation of tenant and landlord exists, a conveyance by the latter of the demised premises cannot operate as a basis of an adverse possession." 12 Am. & Eng. Enc. Law, 707; *Jackson v. Harsen*, 7 Cow., 323. There is no pretense of fraud or mistake on the part of Andrew Boggs, Jr., when he took a lease under the Merchant title, and he did no act that would give his landlord notice of an adverse claim, and as soon as it was brought to the attention of his landlord that his grantees, Mundy and Bodkin, were claiming adversely, and refused to recognize his possession, he took proceedings at once to eject them. Boggs then refused to defend his title, and again acknowledged the validity of the Merchant title. By these acts, Boggs, and any one claiming under him, is completely estopped from setting up a claim to possession under the Alkire title. On his admission that his title was worthless, and acting under his advice, Mundy and Bodkin purchased under the Merchant title.

In 7 Am. & Eng. Enc. Law, 18, the law is laid down that, "where the owner or person having an interest in property represents another as the owner, or permits him to appear as such, or as having complete authority over it, he will be estopped to deny such ownership or authority against persons who, relying on his representations or silence, have purchased or acquired interests in the property." This is founded on the principle that no man can take advantage of his own wrong. Even if his title was ever so good, having deceived them into purchasing under another title, he and his vendees are forever estopped, from asserting his title against those deceived by him or their vendees. "To defeat an action of ejectment, an outstanding title must be a present subsisting operating legal title, on which the owner could recover if asserting it by action." *Wilcher v. Robertson*, 78 Va., 602. Change the parties to this action, and allow the defendant to sue on his Alkire title, he could not possibly recover, because the Merchant deed, ten years' possession, and the two estoppels above referred to would completely bar his action. Neither, then,

can he defeat the plaintiffs' action, because his defense is likewise barred. Plaintiffs might have further claimed that the Alkire title, having been put in issue in the case of *Boggs v. Bodkin*, and decided bad was *res adjudicata*, and that all the evidence introduced by the defendant to establish the same should for this reason be excluded from the consideration of the jury. As we have before seen, both the Merchant and Alkire titles were drawn in controversy in the chancery cause, and the court declined to enforce specific performance of the contract as prayed in plaintiffs' bill because the Alkire title was invalid, and the Merchant title was good, and Andrew Boggs, Jr., was tenant under the Merchant title. These three things were adjudicated and settled by the decree, except in so far as they are made matters of reservation. As to these three things, no reservation was made, but the only reservation was as to whether the defendants Mundy and Bodkin were the true owners of the Merchant title. In this suit their ownership is not denied, but this invalid Alkire title is again brought forward under a misapprehension of what was decided in the chancery cause. It is *res adjudicata*. "A decree is conclusive as to every matter actually and necessarily decided in the former suit." Freem. Judgm. § 256. "If a decree necessarily determines a particular fact, that determination is conclusive, and requires the same fact to be determined in the same way in all subsequent actions between the same parties. And a fact is necessarily determined to exist or not to exist, if its existence or nonexistence is required to support the judgment rendered." *Id.* § 257. The invalidity of the Alkire title was the fact that was determined by the court to exist in decreeing a cancellation of the contract and deed, and in refusing to require it to be specifically performed, and it is the same fact that caused the parties to rescind the contract of exchange in the first place.

With regard to the suit of *Parsons v. Riley*, 33 W. Va., 464, (10 S. E. 806), it is only necessary to say it has no reference to the proceedings of any court of record, but only applies to justices' proceedings, they not being authorized to permit the taking of nonsuits after hearing a case on its merits.

As to the tax matter raised by the defendant, it is impossible to see how the forfeiture of a different tract of land, or the same tract of land under a different title, could inure to the benefit of the junior title, if the land claimed was continued on the tax books, and the taxes were paid thereon by those claiming under the senior title, and none paid by those claiming under the junior title. This claim rests on the adverse possession of Boggs, which is plainly shown to have no existence.

The undisputed facts in this case fully establish the plaintiffs' right to recover possession of their land, of which they have been unjustly deprived. The plain duty of the court is to reverse the judgment of the circuit court in setting aside the verdict, and enter up judgment thereon, and direct an execution to restore plaintiffs to the possession of their property, which is accordingly done.

Reversed.

CHARLESTON.

BREWER v. HUTTON *et al.*

Submitted February 2, 1898—Decided April 22, 1898.

1. ATTACHMENT -- *Custodia Legis.*

Property in *custodia legis* cannot be attached. (p. 115).

2. EXECUTORS. -- *Garnishment.*

Neither an administrator nor a debtor of the estate can be garnisheed, because it disturbs the proper administration of the estate. (p. 115).

45	106
88	238
45	106
82	487
62	499

3. EXECUTORS—*Quasi Officers—Custodia Legis.*

Money, credits, and property are in the custody of the law when held by executors, administrators, guardians and like *quasi* officers in their representative and administrative capacity (p. 115).

4. EXECUTORS—*Sheriff—Sheriff and Executor.*

When the administration of an estate has been legally cast upon a sheriff, "he is thence forward entitled to all the rights, and bound to perform all the duties of such administration," which include as well all legal and equitable defenses to all actions and suits brought against the estate as to prosecute all proper actions and suits for the collection of claims and demands due the estate. (p. 115).

5. EXECUTORS—*Devastavit—Liability of Participants.*

Whenever an executor or administrator violates his trust, and another person takes advantage of the *devastavit*, knowing that the personal representative is not proceeding according to the requirements of the law or the terms of the will under which he was appointed, such complicity will authorize those interested in the estate to hold such third party liable. (p. 117).

6. GARNISHMENT—*Attaching Creditor.*

Voluntary payment to the attaching creditor will not screen the garnishee from his debt to his own creditor. (p. 117).

Appeal from Circuit Court, Randolph County.

Suit by Enoch Brewer against Warwick Hutton, administrator, and others for a settlement of the accounts and distribution of the estate. There was a decree against plaintiff, and he appeals.

Reversed, with instructions.

GEO. W. LEWIS, for appellant.

BUTCHER & HARDING, for appellees.

MCWHORTER, JUDGE:

Joseph S. Brewer, a resident of Green County, Pa., died insolvent, was the owner of a tract of land in Randolph County, which just prior to his death he sold to Omar Conrad for the sum of six hundred dollars. After the death of Brewer, his executors collected two hundred dollars of the purchase money, and took two notes of said Conrad of two hundred dollars each, payable, respectively, on the 1st day of January, 1892, and 1st day of January, 1893, with interest from the 19th of April, 1891, and con-

veyed said tract of land to said Conrad. These two notes, amounting together to four hundred dollars, constituted all the assets of Brewer in Randolph County, of this State. E. M. Everly, one of the creditors of said estate, living in Pennsylvania, assigned his claim to Imri Hunt, then living in Randolph County. Hunt caused the administration of the estate by the county court of Randolph County to be cast upon the sheriff thereof, Warwick Hutton, and at the same time instituted his action at law against Hutton as such administrator, and sued out an attachment summoning Omar Conrad as garnishee. Conrad answered that he owed the four hundred dollars and interest to the estate of Brewer, and would be very glad to pay it if he could be thereby relieved from paying interest. In January, 1892, judgment was rendered in favor of the plaintiff in said action, and an order made directing Conrad to pay the money, which amounted then to four hundred and eighteen dollars and sixty cents, to Hunt, the plaintiff in the action, which order was not entered, however, until July 8, 1892, when it was entered *nunc pro tunc*. At the April rules, 1894, Enoch Brewer filed his bill in equity in the Circuit court of Randolph County against said Warwick Hutton, administrator with the will annexed of said Joseph S. Brewer, alleging that he is one of the creditors of the estate of said Joseph S. Brewer, who died on the 16th of June, 1891, leaving indebtedness largely in excess of the value of his entire estate, both real and personal; that he left a will, which was duly probated in said Green County; that the executors thereof were appointed and qualified, and took charge of and distributed the estate of the decedent in said state of Pennsylvania; that a copy of the will was admitted to record in the county court clerk's office of Randolph County; that said executors never qualified in said county; alleging the sale of the tract of land by Brewer, in his lifetime, to Omar Conrad for six hundred dollars, and that the said Pennsylvania executors carried out the contract to the extent of receiving one-third of the purchase money and taking two bonds of two hundred dollars each for the residue; alleging that on the 30th of January, 1892, by order of the county court of Randolph County, the estate was committed to the hands of defen-

dant Hutton, then sheriff, and that said Hutton had collected both of said bonds, with the interest; alleging that the estate was due to the plaintiff the sum of seven hundred and forty-one dollars and forty-three cents, with interest and costs, in the form of a judgment recovered in Pennsylvania, and exhibited a copy thereof; alleging that Hutton had never settled his accounts as such administrator, had made no effort to convene the creditors of the estate, and had not made the lawful and proper distribution of the funds derived by him from the administration of the said estate; and prayed that the said Hutton be required to settle his accounts as such administrator, and the creditors be convened, and the proceeds of the estate distributed properly among the creditors of the estate.

On the 5th day of May, 1894, plaintiff had the cause remanded to rules, with leave to file an amended bill, making Imri Hunt, Enoch M. Everly, and Omar Conrad parties, and on the 25th of July, 1894, he filed said amended bill, making said new parties, alleging, in addition to the allegations of the original bill, that said Everly finding that the estate of Joseph S. Brewer was wholly insufficient to pay the debts against the same, and knowing of his owning property in Randolph County, came to Randolph, and, after investigation, apparently thinking the chance well-nigh hopeless, assigned his claim without valuable consideration except some verbal agreement as to sharing the proceeds, should anything be realized, to the defendant Imri Hunt, a former neighbor of Everly's, but then living in the town of Elkins, when said Hunt, knowing of these two purchase bonds owing by Conrad, had the estate cast upon Sheriff Hutton, and then brought his action as before stated; that the answer of Conrad as garnishee was ordered to be filed with the papers, and an order made requiring him to pay the money to Everly for the use of Hunt, which then amounted to four hundred and eighteen dollars and sixty cents, the sum to be applied as a credit upon his (said Everly's) judgment obtained in that action, which said judgment was rendered on the 26th of January, 1892, for the sum of six hundred and sixty-three dollars and sixty-seven cents, with interest and costs; that said Conrad paid over the said sum—four hundred and eighteen

dollars and sixty cents—several months before the said order directing him to pay the same was actually entered, or directed by the court to be entered, or was, in legal effect, made by the court; that no attachment bond was ever given by or required of the plaintiff in said action before attaching the said fund in said Conrad's hands; that said Hutton never appeared or made any defense whatever, either in person or by counsel, to said action, as the records expressly declare; that after the payment of the money by Conrad, Hutton executed to him a deed of conveyance for said tract of land, neither of which deeds had been recorded by said Conrad, and therefore could not be exhibited; and alleging that there were several other creditors of the estate in the State of Pennsylvania who were entitled to share in the fund derived from the sale of the tract of land sold to said Conrad; that said Hutton had never made any effort to convene the creditors of said Brewer in the manner required and provided by law, had never made any settlement of his account as administrator with the will annexed of said Brewer, and had not made the lawful and proper effort to collect, preserve, and protect the funds which ought to have been derived by him from the administration of said estate, and had not made the lawful and proper distribution of the funds which ought to have been derived by him from such administration; and alleging that the proceedings in the action of Everly for the use of Hunt against Hutton, administrator, were fatally irregular, and grossly in fraud of the rights of creditors of said decedent, and ought to be declared null and void in this case, and either the defendant Hutton, or the defendant Conrad, or the defendants Everly and Hunt ought to be decreed and held to be responsible for the restoration of the said sum of four hundred and eighteen dollars and sixty cents, with interest accrued and to accrue until so restored in the proper channel for distribution among the several creditors lawfully entitled thereto; and praying that such proceedings in said action of Everly for the use of Hunt against Hutton, administrator, be declared null and void, that defendant Hutton be required to make settlement of his accounts as such administrator with one of the commissioners, and in such settlement be

held personally responsible to said estate for said four hundred and eighteen dollars and sixty cents and interest from the date of the payment of the same by said Conrad, that the creditors of Brewer be convened, and the amounts and priorities of their several demands be ascertained in the manner provided by law, and said sum distributed among the plaintiff and other creditors entitled thereto, either under this court, or else that said fund be transmitted by order of this court to the Pennsylvania executors, or, in case the court should hold the proceedings in said action valid and lawful as to said Hutton, then said Conrad be ordered and required to pay the said fund to said Hutton for distribution among the creditors, or, in case the court should hold said proceedings had in said action to be valid as to Hutton and Conrad, that then defendants Everly and Hunt be ordered to refund said fund so derived by them from said action to said Hutton for distribution, etc.

The defendants appeared and demurred to the bill which was sustained and the bill dismissed as to defendant Conrad, and overruled as to Hutton, Everly and Hunt, and said defendants were ordered to answer within thirty days. Defendant Hutton filed his separate answer, admitting that he was appointed administrator of the estate of Brewer, and at the same time he was notified that the estate was committed to him as sheriff, to be administered, he was served with summons in the attachment or suggestion case mentioned in the bill, and attended court, and was at the hearing of said case at the January term, 1892, with counsel to assist him in guarding the interests of said estate; that he was present when said order was made directing the said funds to be paid by the said Conrad to the said E. M. Everly for the use of Hunt; that he did not know until some time afterwards that said order was not entered at the time, as he was in court when it was so ordered; that he never had control of said fund, or any part of it, but the court had by its process in said action taken charge thereof before he had notice that he was appointed as such administrator, or said estate was committed to him as sheriff; that said fund was collected and paid out under the direction of the circuit court of Randolph County,

under orders conclusive as to respondent unless he had appealed therefrom to the Supreme Court, which he was not advised it was proper for him to do, and for which purpose no funds whatever were in his hands; that at no time had any funds belonging to the said estate come into his hands, and, so far as he had been able to ascertain, no other fund than that due from Conrad, and paid by him to Everly under the order of the court, had ever been in said county; and denied every allegation in the bill not in accord with the facts stated by him, and especially denied that he had neglected his duty as such administrator, and that he had not appeared in said action. The defendant E. M. Everly answered the bill, denying that he had assigned his claim to Hunt without valuable consideration except some verbal agreement as to sharing proceeds should anything be realized thereon, but alleged that in the latter part of the year 1891 he assigned his claim to the said Hunt for a valuable consideration, and had no further interest in the said debt, and did not have at the time of the bringing of the action mentioned in plaintiff's bill; that it was brought for the use and benefit of Imri Hunt, who was the sole owner of said writing or bond obligatory, and who had received all the proceeds arising from the fund collected in the suit, and that he had no pecuniary interest in the result of the suit; and denied all allegations or insinuations of fraud or collusion to deprive the plaintiff or any other creditor from collecting any money that might be due from the estate of decedent. Imri Hunt also filed his separate answer denying that Everly assigned him his note or bill without valuable consideration except some verbal agreement as to sharing in the proceeds should anything be realized on said note or bond, but that he purchased said note from said Everly for a valuable consideration, for the reason that he believed at the time he purchased it that he could make out of the estate of Joseph Brewer the principal part of the money then due on it out of the assets known to him at the time to exist and be in the State of West Virginia, because he knew that Omar Conrad was indebted to the estate in the notes mentioned in the bill; that he was a resident of Randolph County, and owed the money for the land purchased by him from

Brewer in his lifetime; that there were no other debts in favor of parties residing in this State against the estate of Joseph S. Brewer, and he had the estate committed to Warwick Hutton, then sheriff, and brought his action of debt against the administrator, and caused an attachment to be issued and served upon Conrad requiring him to answer as in said bill alleged; and upon the answer of Conrad and proofs offered to the court in said action at law the court ascertained the amount of money due respondent, and gave judgment therefor against the administrator, Hutton, and ordered said Conrad to pay the money which he owed upon the notes to respondent to be credited upon his judgment, which had been done; averring that there was no other estate or property belonging to the estate of said Brewer within the State of West Virginia than the money mentioned due from Conrad; and averring that his proceedings were regular and lawful, and intended solely for the purpose of collecting the money due him, and that the proceedings taken were entirely free from the suspicion insinuated against him in said bill of trying to take advantage of plaintiff or any other creditor of Joseph S. Brewer; and denied the allegations or insinuations of fraud or collusion which might be inferred from the allegations in said bill. To this answer the plaintiff endorsed the following exception: "The plaintiff excepts to the foregoing answer, and objects to the same being filed, because the same constitutes no defense to the bill of the plaintiff."

On the 23d of October, 1895, the cause was heard upon the bill of the plaintiff and exhibits therewith, the separate answers of Warwick Hutton, Imri Hunt, and E. M. Everly to the bill of the plaintiff, and general replications thereto, and the court dismissed the bill, and awarded costs against the plaintiff, from which decree the plaintiff appealed, and assigned the following errors: "First. Because it was improper to dismiss said bill without having first required the said administrator to make settlement of his accounts as such. Second. Because the payment made by said Conrad before he was legally bound to make it, and to a person to whom he was not bound to pay, could afford him no protection against a proper demand made on behalf of the creditors of said estate. Third. Because

the judgment and proceedings in said action at law of Everly suing for the use of Hunt against said Hutton, administrator, was in legal effect a mere nullity, and could afford the defendant Hutton no protection against the petitioner's said bill, for the following reasons: (1) A fund in *custodia legis* is not subject to attachment. This rule covers a fund in the hands of a personal representative, including uncollected debts. (2) The proceedings under said attachment were grossly irregular, and strongly tainted with fraud, as appears from the surrounding circumstances."

Section 25, chapter 85, Code, fixes the dignity and priorities of debts and demands against the estates of decedents, and the following section provides: "No payment shall be made to creditors of any one class, until all those of the preceding class or classes shall be fully paid. But a personal representative who, after twelve months from his qualification, pays a debt of his decedent, shall not thereby be personally liable for any debt or demand against the decedent, of equal or superior dignity, whether it be of record or not, unless, before such payment, he shall have notice of such debt or demand;" and further provisions are contained in sections 29, 30, chapter 87, Code, relative to distribution and disbursement of estates. *Parker v. Donnally*, 4 W. Va. 648, Syl. point 1: "The personal representatives of a deceased debtor are not, as such, the debtors of the creditors of their testator or intestate, within the sense of the statute. They are not liable in the debt, but in the detinet only. The personal estate is in their hands to be administered according to law, and is not, therefore, the subject of garnishment by the creditors of the estate of the decedent." It seems to me, in the light of the statute fixing the priorities of debts and demands against and providing for the settlement of estates of decedents, and of the authorities touching the question, that no debtor of an estate can be attached or summoned as a garnishee. In *Thorn v. Woodruff*, 5 Ark. 55, the court says, "To subject executors or administrators to this process of garnishment might destroy the whole operation and intention of our law of administrations. We are, therefore, of opinion that an executor or

administrator as such is not subject to garnishment." In *Marvel v. Houston*, 2 Har. (Del.) 349, the court says: "The act of assembly settles the priority of payment of debts in the administration of assets, and it will not do to allow it to be disturbed in this way. By allowing the debtors of the estate to be garnished, the assets might be diverted from their lawful course of application. Thus funds applicable to judgment debts might be arrested and applied to simple contract debts. Neither an administrator therefor, nor a debtor of the estate, can be attached or summoned as a garnishee. This is the invariable decision." *Conway v. Armington*, 11 R. I., 116; *Waite v. Osborne*, 11 Me., 185; *Bivens v. Harper*, 59 Ill., 21; *Brooks v. Cook*, 8 Mass., 246. Drake, Attachm. § 251; "Property in *custodia legis* cannot be attached." Wap. Attachm. § 403: "Money, credits, and property are in the custody of the law, when held by executors, administrators, guardians, and like *quasi* officers in their representative and administrative capacity. They are accountable to courts for what they administer, and there is ordinarily the same reason that the law's custody of things and credits should not be disturbed in their hands as there is for non-disturbance in the hands of a sheriff or other officer." Under section 10, chapter 85, Code, the administration of the estate of Joseph S. Brewer was legally cast upon the defendant Hutton, as sheriff, and he was "thenceforward entitled to all the rights and bound to perform all the duties of such administrator," which included all legal and equitable defenses to actions and suits brought against the estate of his decedent, as well as to prosecute all proper actions and suits for the collection of claims due the estate. In his answer he says that at the same time he was notified that the administration of the estate was cast upon him he was served with summons in the action brought against him by Everly, use of Hunt; that he "attended court, and was at the hearing of said case at the January term of said court, 1892, with counsel to assist him in guarding the interest of said estate; that he was [present when said order was made directing the said funds to be paid by the said Conrad to the said E. M. Everly for the use of Hunt." He fails to allege that he entered any appearance in the case

by interposing any plea or objection, or that he did anything whatever to prevent the assets of the estate from being diverted from the proper channel of administration, and applied to the indebtedness of the estate as the law prescribes, but virtually admits that he stood by, and, without opposition, permitted one of the creditors of the estate to illegally seize and appropriate all the assets over which he had control to his individual claim, to the exclusion of all other creditors, who had equal rights with the creditor who thus got the benefit of all the assets. *Wheatley v. Martin's Adm'r*, 6 Leigh, 62; *Nelson's Adm'r v. Cornwall*, 11 Grat., 724, Syl. point 6; and in *Cookus v. Peyton's Ex'rs*, 1 Grat., 231, Syl. point 4: "An administrator, paying away the assets of the estate to distributees without notice of debts or liabilities of his intestate, must account to creditors for the amount so paid away, with interest." Section 5, chapter 87, Code, provides that, "If any fiduciary mentioned in this chapter, shall by his negligence or improper conduct, lose any debt or other money, he shall be charged with the principal of what is so lost, and interest thereon in like manner as if he had received such principal." It was clearly Hutton's duty to have defended said action and saved said money for the benefit of the estate, and to have administered the same as the law provides. On the contrary he admits to being present in court when the case was disposed of, and without objection allowed a judgment entered against him for the debt, and an order made directing the debtor of the estate to pay the money due from him to the administrator to the plaintiff in the action, who had summoned him as garnishee.

Appellant insists that Conrad is not protected by the order directing the payment to Hunt, because his obligation was to the Pennsylvania executors, and to them or to Hutton he was bound to make payment until the court, by its judgment, should intervene, and require him to pay it to some one else; that the order to pay it was not in fact entered until July 8, 1892, several months after Conrad had paid the money over to Hunt. "The payment must not have been voluntary. Any payment not made under execution will be regarded as voluntary, and therefore no protection to the garnishee, unless the law authorized the

court to require the garnishee to pay the money into court, when such a payment will be regarded as, in legal effect, the same as a payment under execution." Drake, *Attachm.* § 711. Although the bill does not exhibit the affidavit for attachment in the action at law, it does allege the contents of the affidavit, and the grounds stated therein upon which the attachment was sued out, and the fact that no attachment bond was given as required by the statute; yet there is no denial of any of those allegations by any of the defendants, and all of which defects in the action at law it was the duty of the defendant Hutton to have taken advantage of in said action; and for his own protection as garnishee in the attachment proceedings defendant Conrad should have availed himself of the defects in such proceedings. *Wap. Attachm.* §§ 926, 959, 963. The defendant Hunt, in his answer, says he purchased said note from Everly for a valuable consideration, for the reason that he believed at the time he purchased the same that he could make out of the estate of Joseph S. Brewer the principal part of the money then due thereon out of the assets known to him at the time to exist and be in the State of West Virginia, because he knew that one Omar Conrad was indebted to the said estate upon the notes mentioned in said bill, and that he was a resident of the county of Randolph, in said state, and owed the money for the land purchased by him from Brewer, and at once commenced the proceedings, and sued out his attachment, and had it served upon Conrad so as to secure the fund in his hands, evidently intending thereby to get the advantage of all other creditors of said Brewer, the record showing that he must have been pretty well acquainted with the condition of Brewers' estate in Pennsylvania: and justifies this harsh remedy by the fact that there were no other debts in favor of parties residing in this State against said estate, and that his was the only one, and that there was no other property or estate belonging to said Brewer in this State. Schouler, in his work on *Executors and Administrators* (section 394), says: "Whenever an executor or administrator violates his trust, and another person takes advantage of the devastavit knowing that the personal representative is not proceeding according to the

requirements of the law or the terms of the will under which he was appointed, such complicity will authorize those interested in the estate to hold such third party liable."

The demurrer as to defendant Conrad was improperly sustained for the reasons herein stated, but the bill should have been dismissed as to him at the hearing, as it is clearly shown that he paid the money with the knowledge, and at least the tacit consent, of the administrator, Hutton. The decree complained of is reversed, with costs against Hunt and Hutton, and the cause remanded for further proceedings to be had to recover from Hunt for the benefit of the estate the money so improperly received by him, and paid him by Conrad, and, in any event, to be charged to said Hutton as administrator, and to be administered in the manner provided by law, and a settlement of the administration accounts of defendant Warwick Hutton.

Reversed.

CHARLESTON.

45	119
56	367
e57	650

KANAWHA, GLEN JEAN & EASTERN R. R. CO. v. GLEN JEAN,
LOWER LOUP & DEEP WATER R. R. CO.

(BRANNON, PRESIDENT, *dissenting*.)

Submitted January 26, 1898—Decided April 22, 1898.

1. INJUNCTION—*Railroads—Right of Way—Title.*

A railroad company claiming adverse right and title to a right of way lawfully in the possession of a rival company by virtue of condemnatory proceedings, cannot enjoin the latter company from proceeding to construct its road until just compensation is paid to the former company. But the disputed right and title must first be settled at law. (p. 125).

2. RAILROADS—*Right of Way—Priority of Location—Title—Eminent Domain.*

As between rival railroad companies, priority of location gives priority of title, which is perfected by after-condemnation. The title thus acquired is derived from the State by virtue of its right of eminent domain, and entirely supersedes and annuls the title of the landowner on payment of just compensation to him, and reinvests the same in the applicant therefor. (p. 125).

3. EMINENT DOMAIN—*Title—Railroads—Collateral Attack.*

Where the right of eminent domain has been exercised in behalf of a railroad company, and the land has been condemned, damages assessed and paid, and the company placed in possession of such land, the title thereby acquired, in so far as it is without reservation, becomes adverse to all other claimants of the property so condemned. Nor can such proceedings be collaterally attacked, except for fraud. (p. 125).

Appeal from Circuit Court, Fayette County.

Bill by the Kanawha, Glen Jean & Eastern Railroad Company against the Glen Jean, Lower Loup & Deep

Water Railroad Company for an injunction and equitable relief. From a judgment for plaintiff, defendant appeals.

Reversed.

J. W. DAVIS and A. D. PRESTON, for appellant.

BROWN, JACKSON & KNIGHT and J. D. MCKELL, for appellee.

DENT, JUDGE:

On the 31st day of October, 1895, the Glen Jean, Lower Loup & Deep Water Railroad Company, in accordance with its charter, began to locate the line of its road through the lands of Thomas G. McKell, in the county of Fayette, and continued the same until completed on the 2d day of November. On the 1st day of November, 1895, a certificate of incorporation was issued to the Kanawha, Glen Jean & Eastern Railroad Company, the incorporators being Thomas G. McKell, two hundred and forty-six shares, M. Jackson, one share, R. G. Quarrier, one share, J. F. Brown, one share, and E. W. Knight, one share; making two hundred and fifty shares. The incorporators forthwith held a meeting, and directed subscription books to be opened under the supervision of E. W. Knight and M. Jackson at the office of Brown, Jackson & Knight, in the city of Charleston, the subscription to be reported to a meeting of the stockholders to be called by them when the subscription should exceed one-twentieth of the capital stock of the company. On the next day the committee reported that T. G. McKell had subscribed ten more shares of stock, and the corporators immediately proceeded to elect themselves a board of directors, without publishing the notices for four successive weeks, as required in section 36, chapter 54, Code. The board of directors passed some by-laws, and proceeded to organize by electing T. G. McKell president, J. W. Brown vice president, E. W. Knight secretary, and S. M. Veall, who was neither a director nor stockholder, treasurer. It then being represented that the line of the road would pass through the lands of Thomas G. McKell, Mr. McKell, who was the president and the whole of the corporation except four shares owned by his attorneys, retired from the meeting,

which at once appointed E. W. Knight to negotiate with Mr. McKell for the right of way through his lands. This was accomplished, and the meeting reassembled, and the right of way was accepted at twelve thousand three hundred dollars, and other land was bargained for at three hundred dollars per acre, according to the necessities of the company. Mr. McKell signed the deed, and it was immediately forwarded to Fayette County for recordation. There was no public notice of any of these meetings, but they were all held, charter obtained, land purchased and conveyance recorded in the space of two days. On the 5th of November, 1895, the Glen Jean, Lower Loup & Deep Water Railroad Company served notice on Thomas G. McKell that it was about to institute proceedings in the circuit court of Fayette County for the condemnation of his land for the use of its road as located and platted. Thomas G. McKell appeared, and on his petition the proceedings of condemnation were removed into the circuit court of the United States at Charleston. Mr. McKell therein appeared, and filed a disclaimer as to part of the land proposed to be taken, and alleged the title was in the Kanawha, Glen Jean & Eastern Railroad Company by virtue of his deed made as aforesaid. The proceedings were thereupon stayed until the notice required by statute should be given the said Kanawha, Glen Jean & Eastern Railroad Company. What further action was taken by the court on this disclaimer does not appear, as only excerpts from the record are presented on either side in this case. Arguments of counsel and oral testimony are not proper in support of so important a question, as the record itself is the only sufficient proof thereof. It is plain, however, from the final order filed that the court did dispose of such disclaimer in some manner favorable to the defendant, for the land is condemned and given to it. It cannot be presumed that the court disregarded the statute, and declined to summon a party shown to be interested in the land proposed to be taken, but it must have either summoned the plaintiff, or decided the defendant's right was the prior and better right to the land. It is not a sufficient answer to this to say that only McKell's title was condemned, but it is the reserved title of the State, which is paramount

thereto, and used to oust McKell's title; the proceeding, so far as taking the land is concerned, being in the nature of a proceeding *in rem* while the assessment of damages is is a proceeding *in personam*. The right of the defendant to take the land for public use cannot be controverted. So the only question at issue and only reason why the plaintiff was, in any event, a necessary party to the condemnation proceedings, was that it might receive its proportionate share of the damages assessed. That the court condemned the land, and not the mere title of McKell, is shown by the latter part of its order, to wit: "The quantity of land to be taken along said outer line is as follows: From station 340 plus 9 of the Loup Creek Branch of the Chesapeake & Ohio Railroad, which station is the O station of the Glen Jean, Lower Loup and Deep Water R. R., as the same is located and marked by a stake, to station 40 plus 75 on said center line of the said Glen Jean, Lower Loup & Deep Water R. R., which station is on the line between the lands of Thomas G. McKell and the lands of N. M. Jepkin, and 4,075 feet from the beginning, 50 feet on each side of said center line, except so much as lies without the track and right of way of the Loup Creek Branch of the Chesapeake & Ohio Railroad, and containing in all nine and thirty-seven one hundredths acres (9 37-100) by survey, be, and the same is hereby, vested in fee simple in the applicant, The Glen Jean & Deep Water Railroad Company. * * * And the petitioner is entitled to a writ of possession against the defendant to put it in possession of the land condemned, and such writ is hereby awarded upon the payment of the costs aforesaid." The plaintiff alleges two grounds for injunction:

1. That the land proposed to be taken is indispensable to it for its purposes, and that it could not be adequately compensated for the loss of the same by the recovery of damages. This appears to be abandoned in the proof and argument, as the statute authorizes the condemnation and taking of just such property by rival railway companies, and any work or grading by the plaintiff was undertaken and done after it had full actual notice of defendant's condemnation proceedings, as its officers, directors, and

stockholders were either attorneys therein or a party thereto, and was, therefore, done in violation of defendant's rights acquired by survey and location of its road.

2. That it had not been secured or paid a just compensation for the land taken. It is plain from its order that the circuit court assessed full damages for the whole of the land, and made no reservation of plaintiff's claim in regard thereto. If it did not require plaintiff notified of the proceedings according to section 8, chapter 42, Code, it may have been because it thought it was the duty of the plaintiff to intervene by petition or other appropriate procedure if it desired to share in the damages, for the reason that it obtained its deed, and placed it on record, after the appropriation proceedings were commenced by survey and location of the route. 3 Elliott, R. R. p., 1450, § 1001. Or it may have been because it considered plaintiff's deed made with intent to delay and hinder defendant in the acquirement of that which it was lawfully entitled to, and therefore void under section 1, chapter 74, Code, which reads: "Every gift, conveyance, assignment or transfer of, or charge upon any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given, with intent to delay, hinder or defraud creditors, purchasers or other persons, of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers or other persons, their representatives or assigns, be void." The circumstances surrounding the incorporation, the organization, and the execution of the deed certainly tend to raise a presumption of an intent to delay and hinder the defendant in lawfully acquiring title to the land. Such has been, and, if permitted to stand in the way, such will be, the effect of the deed; and hence its good faith is an open question for determination on a proper case. Every description of contract, and every transfer or conveyance of property, by what means soever it is done is vitiated by such intent. "Whether the contract is oral or in writing, whether executed by the parties with all the solemnities of deeds by seal and acknowledgment, whether in the form of a judgment of a court stamped with a judicial sanction, or carried out by the device of a corporation organized

with all the forms and requirements demanded by any statute, if it is contaminated with fraud, the law decrees it to be a nullity. Deeds, obligations, contracts, judgments, and even corporate bodies may be the instruments through which parties may obtain the most unrighteous advantages." All such devices are nullities and the law disregards them as though they had never been executed. Bump. Fraud. Conv. p. 267, § 228. For a landowner, after he acquires the knowledge that a railroad corporation is about to proceed to appropriate a portion of his land for its uses under the right of eminent domain, to start a rival corporation, and deed to it such land for the purpose of hindering, delaying, and defeating by excessive damages such appropriation, is undoubtedly within the spirit and letter of the statute. If such things were permitted, a landowner, his wife, and three children, without the assistance of others, might become a railroad corporation for damages only. Or it might be that the court, being aware of the fact that Thomas G. McKell owned exceeding ninety eight per cent. of the stock, and his attorneys owned less than two per cent., decided that the Kanawha, Glen Jean & Eastern Railroad Company was but another name for Thomas G. McKell, and that when he stood outside, and waited for the less than two per cent. of the stock to resolve to purchase the land of the exceeding ninety-eight per cent., and then made a deed in accordance therewith, he was but making a deed from McKell to McKell, and, having the real person in interest before the court in his proper name, it was not necessary to notify him also to be present in his corporate name, and that, in whatever way it might regard him, he was still the true equitable owner of the land in controversy. Such a court of equity, looking through all forms and devices, would determine. These are mere conjectures, and are only given to illustrate the status of the present litigation, and not as intimations that McKell was guilty of fraudulent intent beyond what may be justly inferred from the facts; such determination not being necessary to the decision of this case. A person having indisputable right to land, although there may arise quibbles in regard thereto, may enjoin a railroad company from taking the same until his

compensation therefor has been paid or secured. But where a railroad company has condemned land for its location, paid the damages assessed, and been put in possession thereof by the court, a rival railroad company, claiming a prior right thereto adversely, cannot enjoin the railroad so in possession, until it has established the superior right at law. In the case of *Railroad Co. v. Blair*, 9 N. J. Eq., 635, it is held that it is "not in accordance with the practice of a court of equity upon a mere injunction bill to investigate and decide the legal title of two railroad companies under their respective charters to a conflicting route." *Eric Ry. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq., 283; *Canal Co. v. Young*, 3 Md., 480. And in the case of *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. St., 408, (21 Atl., 646), it was held: "In the absence of the location of its right of way by corporate action, a railroad company has no standing to ask for an injunction restraining another company from proceeding regularly to appropriate land for a roadway, even though the land in question may be owned by the plaintiff company." Also: "As to third persons and rival corporations, the action of the company adopting a definite location is enough to give title." In 3 Elliott, R. R. § 927, the law is stated to be: "When a proposed line has been regularly located and staked off, and the expense thereof has been paid, the corporation by which it is done has a prior claim to the right of way for a reasonable time which cannot be defeated by another company that procures voluntary conveyances from the owners before the proceedings in condemnation instituted by the first company have been terminated." *Pittsburg V. & C. Ry. Co. v. Pittsburg, C. & S. L. R. Co.*, 159 Pa. St., 331, (28 Atl., 155); *Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co.*, 27 Fed., 770. Between rival railroad companies the question of priority of location is a legal question, to be determined from the evidence and circumstances of the case. It is one of fact to be inquired into by a jury. The plaintiff claims the land by deed from the landowner; the defendant from the State by virtue of condemnation proceedings, and is in lawful possession under the order of the condemnatory court. The presumption of right is with the de-

fendant. Under such circumstances the plaintiff is not entitled to an injunction until it has established the supremacy of its claim at law. The defendant, being in possession, might have answered setting forth the superiority of its right, and attacked the plaintiff's deed as a cloud on its title, but it preferred to rely upon its legal rights. To do so is its privilege. This conclusion renders unnecessary further consideration of the other questions raised. The decree complained of is reversed, the injunction dissolved, and the bill dismissed.

BRANNON, PRESIDENT, (*dissenting*):

This is a contest between two competing railroads for ground for right of way. The Glen Jean, Lower Loup & Deep Water Railroad Company made a survey for the location of its line, beginning 29th of October and ending 2d of November, 1895, upon land of McKell. On November 2d, McKell conveyed to the Kanawha, Glen Jean & Eastern Railroad Company a strip of land for its right of way. On November 5th the Glen Jean, Lower Loup & Deep Water Company served on McKell a notice of an application by it in the circuit court of Fayette County to condemn the land which it had surveyed for its road, including parts of that so conveyed by McKell to the Kanawha, Glen Jean & Eastern Railroad Company, and on that day filed its application to condemn. McKell was a party to that proceeding, but the Kanawha, Glen Jean & Eastern Railroad Company was not. This proceeding resulted in a judgment condemning for the use of the Glen Jean, Lower Loup & Deep Water Railroad Company "the title of the defendant Thomas G. McKell to the real estate described in the application." Later the Kanawha, Glen Jean & Eastern Railroad Company brought an injunction suit against the Glen Jean, Lower Loup & Deep Water Railroad Company, stopping it from building its railroad over the land conveyed to the former company by McKell, and, the injunction having been perpetuated, the defendant company brings the case here by appeal.

Several questions arise in this case. One question is, did the mere location of its line by the Glen Jean, Lower

Loup & Deep Water Company give it priority over the Kanawha, Glen Jean & Eastern Company to the ground in dispute? Was the right of said locating company so far perfected as to vest in it an inchoate title, so that the conveyance from McKell to the Kanawha, Glen Jean & Eastern Company would be held void because it would be a subsequent purchase of the land? It is claimed that the mere survey created what I may call a "clamp" upon that land,—a right to it in preference to all other railroad companies, forbidding the owner of the land to sell it, or any other company to buy it from him. I am clear in the opinion that, after the proceeding for condemnation begins, any one purchasing the land acquires a void title because he is a *pendente lite* purchaser, and the statute requiring recordation of *lis pendens* does not apply; but, unless we hold that the mere survey is the commencement of the proceeding for condemnation, the deed from McKell to the Kanawha, Glen Jean & Eastern Company cannot be affected on the theory that said company is a *pendente lite* purchaser. But I think that such survey is no part of the process of condemnation, and that that process has its commencement with the service of notice of the filing of the application. I do not think that our statute law can be so construed as to date commencement of the condemnation procedure earlier than the service of notice. Code, c. 54, section 50, does, it is true, provide that a railroad company may "cause such examination and survey for its proposed railroad to be made as may be necessary to the selection of the most advantageous route, and for such purpose, by its officers, agents, engineers, or employees, may enter upon lands or waters of any persons or corporation;" but the very language indicates that this is a preliminary proceeding anterior to the actual selection, by the corporate authorities of the company, of the route of the railroad, and is not itself a fixed selection or location, and cannot be a part of the legal proceeding, and, moreover, cannot even be a location. It requires something further in this State, whatever may be the law in other states, as the question depends largely on statute law variant in the different states; and in reading the law books we must keep our eyes upon these various statutes under which the de-

cisions were rendered. It is clear to me that after such survey there must be action by the board of directors of the company adopting the location to constitute it an appropriation of the land, so as to give title to one railroad company as against another. An engineer alone cannot make a location. This has been held by the Supreme Court of Pennsylvania in *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. St., 407, (21 Atl., 645). The late and invaluable work on Railroads by Elliott (volume 3, § 927) states the rule properly, thus: "The location of the road results only from some definite action on the part of the corporation itself. An engineer alone cannot locate a railroad so as to give title to the company that employs him; and a preliminary survey, made by an engineer, which has never been reported to or adopted by the company, does not constitute a legal location of the line of the railroad which will give such company priority over another company that has adopted a line covering a portion of the same territory." Lewis, Em. Dom. § 306, says that to give priority to one company over the other there must be a complete location. Pierce, R. R., 157, says "the prior right attaches to the company which first actually surveys and adopts the route and files its survey according to law." 2 Wood, R. R. § 269, says that: "To constitute such location there must be some definite corporate action on the part of the company establishing and adopting some definite route. The mere fact that an engineer alone surveyed and marked out a line is not sufficient to amount to a valid appropriation of the location by the company, and it cannot afford ground for proceedings against a rival company occupying that line." So holds *Barre R. Co. v. Montpelier & W. R. Co.*, 61 Vt., 1, (17 Atl., 923).

Now, the rights of the Glen Jean, Lower Loup & Deep Water Railroad Company cannot meet the demands of this law, as it does not appear that its survey was returned to the company or adopted by it, prior to McKell's deed to the other company. Indeed, I may say it was not because the actual ground survey was not completed until 2d of November, and the plat was not likely returned until later, as I find an exhibit made by its engineer, giving the description of the land, dated 4th November. McKell's deed

to the other company was 2d November. Thus, when that deed was made, the defendant company had no right in the land to prevent the owner from selling it, or to prevent the other company from buying it. Code 1891, c. 54, section 65, provides that a railroad corporation shall, within a reasonable time after its railroad is located, cause a map and profile, showing the owners of the lands through which it runs, to be filed in the office of the secretary of state and the office of the clerk of the county court in each county through which it runs. What effect as an appropriation of land such plat, when filed, would have, I need not say, as there is no appearance that that section was complied with by the Glen Jean, Lower Loup & Deep Water Company. That plat could not be filed until the location should be adopted by the directors of the company. Thus no right could vest in a locating company at earliest until its directors adopted a location. My own opinion is that there is no appropriation preventing another company from acquiring the right of way until the actual commencement of the proceeding for condemnation. We ought to have a fixed rule in this matter. Any rule is better than none. If we say that a mere survey by an engineer, or even one adopted by the directors, constitutes an appropriation as against other companies, it opens the door to uncertainty. Take our State. It has been checked by surveys without number, so that, if they are living, it would be an Egyptian labyrinth of confusion. I know that the law does not keep alive these locations anywhere indefinitely, but how long do they last? No statute fixes their duration, and excuses of all sorts, and based on variable oral evidence will be set up, or might be, to prolong their lives, and thus the door of uncertainty would be open, and these surveys might come to be a Pandora's box of evil; but, if we adopt the rule that only the commencement of a condemnation proceeding can give right, we have a rule of safety and certainty. I surely would not commence it before the filing of a plat in the clerk's office under said statute. In this connection it is pertinent to remember, as bearing on this question, that the owner of land has as an inherent part of his estate the *jus disponendi* (the right of disposal) and when you take

away that for even a very short period, you detract from the efficacy of his estate in the land. You take from it a valuable element,—the power to sell when he pleases; and you take from others the power to buy. If you hold that the mere survey or order of the board of directors is an appropriation of the land, you lay an embargo upon the right of the owner to sell, and this amounts to a "taking," within the meaning of the Constitution, for, while it is true that such location cannot be considered an appropriation as to the owner, and that nothing but actual payment will affect his right, yet if you hold it as an appropriation of the land as to a rival company and others, it inevitably affects the owner, because if he cannot find a purchaser, of what avail is his estate during the continuance of the embargo? Its effect upon him is direct, and repugnant to that provision of the Constitution which says that his property shall not be taken or damaged without just compensation. If you continue this embargo a day, it may be vastly damaging to him. The case of *Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 27 Fed., 770, is not applicable. That was under a law allowing the company to take and hold so much land as might be necessary for the location and construction of the railroad, and proceedings had been instituted for condemnation, and the competing company was a *pendente lite* purchaser. The law governing that case provided that application might be made to a sheriff to appoint commissioners to assess damages, and Judge Shiras declared that "from the time the application is made to the sheriff the condemning company has a right which cannot be defeated by the owner in conveying a right of way to the rival company." He thus dates the birth of the right of the condemning party from the commencement of proceeding, and he says that whether such right can in any case antedate the application to the sheriff was open to question even under that statute. No other authority is cited to sustain the claim of the defendant that its rights dated from its survey that has any bearing, and we have seen that the Sioux City Case does not sustain the pretention of the defendant tested by the law of this State. The statute in that case declared that the company might

take and hold for location, and did not, as our statute does, provide first for a proceeding in court; and there was reason to say that when an actual location was made under the Iowa statute it gave an inchoate right; but our statute, if constitutional, only allows an entry on the land for examination. It only defends the company from an action of trespass for unlawful entry, but confers no right. It is purely preliminary. It is the proceeding in court alone which vests any right.

Another question arises under the contention that the deed from McKell to the Kanawha, Glen Jean & Eastern Company is fraudulent as to the rights of its rival company. That question is answered by what I have just said. The statute of fraudulent conveyances has no reference to such a subject, but only the principle of equity that one man shall not purchase what another man has already obtained from the same man, under principles of courts of equity; but in order to apply this rule, he who claims to be first must be one who has a vested right in the property at the time of the conveyance alleged to be second.

Another question is whether equity has jurisdiction, or whether, before applying to it the Kanawha, Glen Jean & Eastern Railroad Company must vindicate its title by an action at law before going into equity, as if it were purely a question between two distinct adverse titles. It is seriously contended in this case that equity has no jurisdiction. I had thought that, wherever irreparable injury was being done to real estate, jurisdiction in equity to enjoin it was unquestionable; and surely, where one railroad company is about to take from another its right of way land, that is an injury falling under the head of irreparable injury. The bill alleges that this ground is indispensable to the plaintiff company for its line of railroad. Both companies claim from a common source—McKell. It is not a claim of two distinct, hostile titles; but, if it were, the character of the act doing irreparable damage would give jurisdiction to equity, for it has often been held in this State, as elsewhere, that where a municipal corporation is about to remove buildings, or open a street through the land of a citizen, or where one railroad company is

about to take the right of way land of another company, and build its railroad on it, equity will stay the act until compensation paid. *Boughner v. Clarksburg*, 15 W. Va., 394; *Teass v. City of St. Albans*, 38 W. Va., 1, (17 S. E. 400); *Spencer v. Railroad Co.*, 23 W. Va., 406; 3 Elliott, R. R. § 1125; High, Inj. § 622. Of course, if equity would enjoin, as it often has enjoined, a railroad company or town from appropriating a citizen's land, it would enjoin one railroad company from appropriating land of another company. As said in *Spencer v. Railroad Co.*, *supra*, the owner may, as a matter of right, enjoin, because the Constitution defends his property until compensation paid, and the Constitution cannot be effectively enforced except by injunction; and must one railroad company allow another to take possession of land owned by it, indispensably necessary for its own use, and, on the theory that the claims are adverse, bring ejectment or trespass to establish its superior right? What would occur in the meantime? The company in possession would go on building its road, unless stayed by injunction, and why not resort to that at the outset, the only efficient remedy? This shows the fallacy of the idea that there must be first a resort to the law court.

The point is made that the conveyance from McKell to the Kanawha, Glen Jean & Eastern Company does not cover the land in controversy. It has an undisputed and indisputable initial point and a terminal point, and the line is rigid, and I think from its minute description there could be no difficulty at all in an engineer laying it down. I will not enter into details in this complicated matter. There is no doubt, as shown by the evidence, but that that deed was intended to convey the land in controversy, and the plaintiff company was in possession of it, having its roadbed there, and the defendant company was destroying it; so there is no doubt as to this deed covering that land. Placing ourselves in the situation of McKell and the company to which he granted, looking at the purposes for which the deed was made, viewing the surrounding circumstances, and taking the calls and the points therein, there can be no difficulty in locating this land. The main object of a description in a deed is not in and of itself to

identify the land,—that it rarely does, or can do, without helping evidence,—but to furnish the means of identification; and, when this is done, it is sufficient. That is certain which can be made certain. By the aid of extrinsic evidence, surrounding circumstances, and the calls, this land can clearly be identified. *Thorn v. Phares*, 35 W. Va., 771, (14 S. E. 399); *Warren v. Syme*, 7 W. Va., 474; *Adams v. Alkire*, 20 W. Va., 480; *Simpkins v. White*, 43 W. Va., 125, (27 S. E. 361); Devl. Deeds, §§ 1012, 1039. McKell was the only party to the condemnation proceeding under which the defendant claims, and he disclaimed any right, and informed the court that the plaintiff company owned the land, and filed his deed to it, thus giving notice to the defendant company of the rights of the plaintiff company; but the plaintiff company was not made a party, and its rights were not affected by the decree of condemnation. It was a necessary party under section 6, chapter 42, Code. The circuit court enjoined the defendant company from taking possession and building its road on the land of the Kanawha, Glen Jean & Eastern Company, conferred upon it by said deed, until the defendant company should, in the manner prescribed by law, obtain right of way from the plaintiff company. In this, I think, the circuit court was right, and I would affirm its decree.

Reversed.

CHARLESTON.

RICHARDSON *et al.* v. GRAHAM *et al.*

Submitted February 10, 1898—Decided April 22, 1898.

1. CORPORATIONS—*Promoter's Rights—Contracts.*

Where a party holds an option on a tract of land for which he agreed to pay six thousand dollars, with a view of organizing a joint-stock company for the purpose of drilling for oil and gas, and and associated others with him to assist in soliciting subscriptions to the stock of said proposed company, and, in so doing, attached a written statement to each subscription paper, proposing to sell said tract of land to the company, when organized, at the price of eight thousand five hundred dollars and after the stock was subscribed, and the company organized, it agreed to purchase said property at said price, said party was entitled to the profit arising from the sale of land to the company. (p. 140).

2. CORPORATIONS—*Contracts.*

While a corporation cannot ratify contracts made in its name or behalf before it has acquired life, it may exercise its power to make contracts when it comes into existence by accepting or adopting such contracts. (p. 142).

3. CORPORATIONS *Promoter's Rights—Stock—Payment for Stock.*

Such company being indebted to the promoter of the company for said tract of land, and said promoter being indebted to the company for stock subscribed for by him, the promoter had the right to pay for his stock by giving the company credit to that extent upon the purchase money due him for said land. (p. 142).

Appeal from Circuit Court, Wood County.

Bill by William Richardson and others against A. B. Graham and others for a receiver and equitable relief. From a decree for plaintiffs, defendants appeal.

Reversed.

McCLURE & FARRER and TURNER & TURNER, for appellants.

VANWINKLE & AMBLER, for appellees.

ENGLISH, JUDGE:

A. B. Graham was the owner of an option on a tract of land of ten acres, by which he was entitled to have a conveyance therefor from the executors of T. J. Cook upon the payment of six thousand dollars, and, being such owner, undertook to get up a joint-stock company, with a view of disposing of said option for eight thousand five hundred dollars. The proposed company was to be capitalized at twelve thousand dollars, of which eight thousand five hundred dollars was for said option, and three thousand five hundred dollars for putting down a test well on the property. Graham associated with himself W. H. Ogden, and Lysander Dudley and D. B. Grier, partners, as Dudley & Grier, to assist in obtaining subscriptions to the stock, to be paid out of the two thousand five hundred dollars profits derived by Graham from the sale of the option. A paper was prepared and signed by Graham, to the effect that he was the owner of said option, and that he would sell to the company for eight thousand five hundred dollars, a copy of which paper so signed was attached to three agreements to subscribe for stock, in the proposed company,—one each for Graham, for Ogden, and for Dudley & Grier, who used them in obtaining subscriptions to said company's stock. On November 12, 1890, the company was organized. J. M. McKinney, E. F. Lathrop, A. B. Graham, J. W. Vandervort, and R. J. A. Boreman were made directors. McKinney was elected president, and Graham treasurer. The agreements of the several persons subscribing for stock were accepted by the directors, and the balance due from them was called for. The board on December 30, 1890, accepted the said option at eight thousand five hundred dollars; and on January 10, 1891, in a general meeting of the stockholders, the question with regard to the profit of two thousand five hundred dollars was discussed; and Morehead, one of the plaintiffs (Richardson being

present), asked to have the money in the treasury, three thousand, five hundred dollars repaid to the stockholders who had paid their shares, excluding the twenty-five shares received by Graham, which resolution, together with another made to wind up the affairs of the company, was overruled by a majority, after a full disclosure of the profit in the sale of the option had been made. On January 12, 1891, the board set aside the former resolution accepting the land and option after they had been fully advised of the two thousand five hundred dollars profit, accepting the land and option at eight thousand five hundred dollars, and directed its attorney to sue for the amounts due on stock which some stockholders were refusing to pay on account of Graham's profit, which they claimed he had concealed from them. On February 14, 1891, Richardson & Morehead, in a directors' meeting moved that Graham and his associates be compelled to pay in money for the twenty-five shares of stock, that they be not allowed two thousand five hundred dollars profit on their purchase, or that the stockholders be relieved from their subscriptions; and these requests were refused by the board of directors. On March 5, 1891, Richardson, J. L. Cramer, E. H. Morehead, and J. M. Circle asked the secretary to call a meeting of the stockholders, to be held at Richardson's office, requesting that said Richardson be permitted to issue the notices, who failed to give notice to many stockholders, among them Graham, Ogden, Grier, and Dudley; and the place said meeting was to be held was different from that named in the by-laws. At this meeting, the purchase of the land was confirmed at six thousand dollars; and it was resolved not to allow Graham the two thousand five hundred dollars profit, and to protect the interest of the company and of the stockholders.

On the first Monday in April, 1891, a bill was filed in the circuit court of Wood County by William Richardson and others, representing themselves as owners of more than one-third of the stock, alleging that, in the autumn of 1890, Graham undertook to get up a corporation for the purpose of producing oil, and approached the plaintiffs, to induce them to subscribe for stock in the

proposed company, representing that it was being formed for the mutual interest and benefit of all who should subscribe, and that the operations were to be carried on for the benefit of all stockholders; that the land mentioned could be purchased on behalf of the proposed company for eight thousand five hundred dollars; that Graham had secured an option on the land, and he would give the company the benefit of such option at eight thousand five hundred dollars. And a subscription paper was shown them, on which several of the promoters had subscribed large sums,—Graham, one thousand dollars; Ogden, one thousand dollars; and Dudley & Grier, five hundred dollars. The plaintiffs in their bill allege that they were greatly influenced to subscribe for this stock by reason of the fact that the promoters had made such liberal subscriptions, and by their representations that they were getting up the company for the common benefit, and that it was never suggested that said promoters were to pay their subscriptions otherwise than in money; that Richardson and Cramer asked Graham directly whether all shareholders were to share alike, and if the company was being organized for mutual benefit, or if there was a bonus or profit for any one, or any advantage to be taken by any of the parties as against other subscribers; and said Graham promptly replied that all would share alike, that it was a common equal square deal, all to be on the ground floor, with no bonus or advantage to anybody, etc. Without following the numerous allegations of a lengthy bill, the plaintiffs rely mainly for relief on the alleged fact that the promoters induced them to subscribe by their own liberal subscriptions, thereby showing their faith in the venture, and by fraudulently representing that they were putting in the property at eight thousand five hundred dollars,—just what it cost them,—and no profit was to be realized by them, when in fact they were realizing two thousand five hundred dollars thereby; praying that the affairs of the company may be wound up, and its assets distributed among its stockholders as they severally may be entitled; that the money paid by plaintiffs may be refunded, and their subscriptions canceled; that a receiver be appointed to take charge of the affairs of the company, col-

lect the assets, and distribute the same under the decrees of the court; and that all agreements, etc., might be canceled and set aside; and that A. B. Graham be required to account for moneys paid into the treasury; and for general relief.

This bill was answered by Dudley & Grier, Graham Oil Company, W. H. Ogden, and A. B. Graham, who deny that plaintiffs represent one-third of the stock in said company, and put in issue every material allegation of the bill, and claim there was no fraud or concealment practiced upon any of the subscribers to said stock; that they subscribed to a paper which on its face showed that the company was to pay eight thousand five hundred dollars for the option held by Graham; and there was no attempt to deceive them in any respect. On November 12, 1891, the complainants tendered an amended bill, and moved to file the same, in which they represent that on November 4, 1891, at a regular annual meeting of the stockholders, seventy-six and one-half shares of the stock being represented, all of the shares but one voted to discontinue the business, close it up, and to ratify and affirm the bringing of this suit; and further allege that the affairs of the company cannot be wound up until the rights of the stockholders have been adjudicated, and the matters at issue in the cause decided; and ask that the words in their original bill, "that the moneys paid by your orators be refunded to them, and their subscriptions canceled," may be stricken out; that the said corporation may be dissolved; and for general relief. Graham, Ogden, Lysander Dudley, and Sarah Grier, answering said bill, deny the jurisdiction of the court under the statute to grant the relief prayed for. Numerous depositions were taken, and on the 19th of August, 1896, a decree was rendered in the cause, overruling the exceptions filed to a report made by Levin Smith, commissioner, on February 12, 1896, and directing that the Graham Oil Company recover from the parties mentioned in said report the amounts therein found against them as due the company; and from this decree A. B. Graham and Lysander Dudley obtained this appeal.

The first decree complained of as erroneous is the one entered on the 9th of March, 1895, in which it was decreed

that any and all arrangements, resolutions, and proceedings undertaken by the directors to bind the company or stockholders to pay eight thousand five hundred dollars for the land, which cost only six thousand dollars, are in derogation of the rights of said stockholders, and are not binding upon said company; and that the difference of two thousand five hundred dollars could not properly be charged to said company; and that Graham, Ogden, and Dudley & Grier were bound to pay their respective subscriptions to the stock of said company in money; and that all the assets of the company should be converted into money, and properly distributed. On the 27th of July, 1895, the cause was referred to a commissioner, to ascertain the names of the persons liable for stock of the Graham Oil Company, for what amount each party became so liable, and in what way; second, what amount, if any has been paid by each of the parties so liable as stockholders or otherwise for the stock of said company, and in what way have such payments been made; third, what stockholders or persons liable for stock have failed to pay, in whole or part, the amounts for which they became liable, and what amount is now due by each person on account of such stock; fourth, what persons have paid in full for the amount of stock on which they are liable. A report was made in pursuance of this decree, finding that neither Graham, Ogden, nor Grier & Dudley had paid anything on the stock subscribed by them. This report was excepted to by defendants--First. Because this is a suit at the instance of stockholders and not of a creditor, and it was therefore error to find and report any liability on the part of the defendants, or any of them, or of the estate of D. B. Grier, deceased, to pay for the shares of stock issued to and held at any time by them or any of them, at its full par value in money, in the absence of a contract to that effect or of a statute creating such liability as between stockholders. Second. Because it was error to find and report that there was any liability on the part of the defendants, or any of them, to pay the calls made on shares of stock subsequent to the transfer of said shares by the defendants, or any of them; and it was error, therefore, to find and report such liability to pay the unpaid subscrip-

tions on stock transferred by them, or either of them, prior to the institution of this suit. Third. It was error to find that there was a liability on the part of the defendants, or either of them, to pay unpaid subscriptions on shares of stock issued and reissued by said company, as fully paid up, especially at the instance of stockholders, who had acquiesced in the same. Fourth. It was error to find and report such liability for unpaid subscriptions on shares of stock which had been treated by the company as fully paid up, and on which dividends had been declared and paid by the company. Fifth. Unpaid subscriptions constitute a fund for the benefit of creditors, and not for the benefit of stockholders, and no right is shown on the part of the plaintiff stockholders to enforce the liability of unpaid subscriptions.

The entire controversy in this case grows out of the fact that Graham purchased the ten acres of land in the proceeding mentioned, or obtained an option thereon at six thousand dollars, and, having it at that price, proposed to get up a joint-stock company, and sell it to them at eight thousand five hundred dollars. This he had a perfect right to do if he could get the company after it was organized to accept it at that price. It could not concern the company or any of its stockholders what the property originally cost Graham, if they were willing to take it, and did agree to take it, at eight thousand five hundred dollars. After it was ascertained by some of the stockholders that the property cost Graham only six thousand dollars, they seemed to think he ought to have sold it to the company at the same price. The option, however, was Graham's property, and he had a right to sell it for all he could obtain for it. Can we say that Graham deceived the subscribers for stock in this company as to the price he expected the company to pay for the property? Certainly not, when the evidence shows that at the head of the subscription list appeared the following statement in writing: "The real estate contemplated to be operated by the oil company when formed is situated in Pleasants County, W. Va., containing ten acres, and generally described as part of the T. J. Cook estate at Vacluse, for which I hold the option, and agree to sell all my rights therein to said

company, for eight thousand five hundred dollars, when said company is organized,"—dated October 11, 1890, and signed, "A. B. Graham." So that every subscriber who took stock had an opportunity to read the above statement when he signed the subscription list if he desired, and, if he signed without reading, he had no one to blame but himself.

The circuit court erred in overruling the exceptions to the report of Commissioner Levin Smith, and confirming the same, and in holding that nothing had been paid by A. B. Graham, Ogden, and Grier & Dudley upon their shares of stock in said company, and holding that they were indebted to said company for the stock subscribed for by them. This conclusion is reached when we consider the fact that the company purchased from Graham said ten acres of land, for eight thousand five hundred dollars; and, as to the stock subscribed by Graham, he certainly had the right to give the company credit with the amount of the stock he had subscribed for, instead of requiring the company to pay him the money. He also had the right to pay Ogden and Grier & Dudley for their services in getting the stock subscribed; and to do so by allowing the company credit on the purchase money for the amount of the stock subscribed by Ogden and Grier & Dudley, instead of requiring the company to pay him the money to that extent on the purchase of the lot, which he did. The report of said commissioner was therefore erroneous in finding that nothing had been paid by said parties on the stock subscribed for by them, but should have reported the stock as fully paid up. *Jerman's Adm'r v. Benton*, 79 Mo., 148.

Here was a written proposition, signed by A. B. Graham, proposing to sell this property to the company when organized for eight thousand five hundred dollars, which proposition was accepted, and thereby became a contract. So, in the case of *Crump v. Mining Co.*, 7 Grat., 353 (sixth point of syllabus), it was held that where the representations contained in a written proposal of sale were in all material respects true, and no fact within the knowledge of the vendors materially affecting the value of the thing sold was suppressed, to the injury of the purchasers, the sub-

sequent failure of the mine in value and productiveness does not impair the right of the vendors to enforce the contract. As to the right of Graham to credit the company for the amount of his stock on the purchase money the company owed him, the authorities say: "It would be too refined a distinction for ordinary purposes to require a subscriber to hand over to the corporation the money which the corporation would be at liberty the next minute to hand back to him, in the purchase of goods, or whatever they might need in the business for which they were incorporated." That Graham clearly had the right to take his pay in stock, see *Coffin v. Ransdell*, 110 Ind., 417, (12 N. E. 20), where it is held that "subscriptions to corporation stock need not, in the absence of statutory provisions requiring it, be paid in cash, but any property which the corporation is authorized to purchase, or which is necessary for the purpose of its legitimate business, may be received in payment." Now, it is apparent that there is no obligation on the company, when all of the stock was subscribed, to accept this property at the price of eight thousand five hundred dollars. This was his written proposition; but, when the company was organized and accepted it, the proposition became a contract, and the company was bound to pay this price for it, whatever it cost Graham. While a corporation cannot, according to the weight of authority, ratify contracts made in its behalf before it has acquired life, it may, under what is perhaps the prevailing American doctrine, exercise its power to make contracts when it comes into existence, by accepting or adopting such contracts; and that is precisely what was done in this case. In support of this, see *Alger, Promoters Corp.* §§ 202, 203; *McArthur, v. Printing Co.*, 48 Minn., 319, (51 N. W. 216); *Mor. Priv. Corp.* § 548. The only fraud claimed by the plaintiffs, to have been perpetrated by Graham and his associates in obtaining subscriptions to the stock of said company was in concealing the price paid for the property by Graham; but it is apparent on the face of the record that after the facts were made known, and the company chartered and organized, it contracted to purchase the property for eight thousand five hundred dollars; and although the stockholders, at an

illegally constituted meeting, repudiated the contract, it was nevertheless legally binding upon the company. Yet the court erroneously allowed the stockholders to share in said profit of two thousand five hundred dollars, and refused to allow Graham and his associates credit for said sum of two thousand five hundred dollars. The decrees complained of are, for the reasons aforesaid, reversed and the cause remanded, with costs.

Reversed.

CHARLESTON.

ROBERTS v. BETTMAN *et al.*

(ENGLISH, JUDGE, *dissenting.*)

Submitted February 7, 1898—Decided April 22, 1898.

1. OIL LEASE—*Construction of Lease—Forfeiture—Option of Lessor.*

A lease for oil and gas contemplates that the lessee have two years in which to bore a well, and provides "that the party of the second part shall pay to the party of the first part \$.00 per month in advance, until a well is completed, from the date of this lease, and a failure to complete such well, or to pay said rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall, after such failure, accrue to either party on account of the breach of any covenant herein contained * * * It is further agreed that the second party shall have the right at any time to surrender this lease to the party of the first part, and thereafter be fully discharged." The lessee bores no well, but holds the lease a number of months, and then

45	142
147	87
447	88
447	100
447	511
45	143
48	461
45	143
161	675

45	142
663	165

45	143
65	43

surrenders it. *Held*, that the forfeiture provisions are for the lessor's benefit, and he can avail himself of them to declare a forfeiture for nonpayment of rental or not, as he chooses, and, if he does not, can recover rental until the surrender of the lease. The lessee's mere failure to pay does not release him from obligation to pay. There was tacit consent to renew. (p. 145.)

2. OIL LEASE—*Recovery of Rental—Release.*

Where, under a lease, there may be recovery of monthly rental for a number of months, but not for all claimed by plaintiff, and he recovers a verdict for more than he is entitled to, he may release the amount beyond the proper number of months, and defendant cannot complain of it. (p. 150.)

Error to Circuit Court, Tyler County.

Action by W. H. Roberts against M. A. and D. Bettman on covenants in a lease. From a judgment for plaintiff, defendants bring error.

Affirmed.

McCLURE & FORRER, for plaintiffs in error.

J. B. BLAIR and F. L. BLACKMARR, for defendant in error.

BRANNON, PRESIDENT:

Roberts made two leases of two tracts of land to Boyle for oil and gas purposes, by which Boyle agreed to pay a certain share of oil for oil wells, and a certain money rent for gas wells, should producing wells be bored. The leases contained the clauses: "It is agreed that the party of the second part shall pay to the party of the first part \$100 per month in advance until a well is completed from the date of this lease, and a failure to complete such well, or to pay said rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall after such failure, accrue to either party on account of the breach of any covenant herein contained. * * * It is further agreed that the second party shall have the right at any time to surrender this lease to the party of the first part, and thereafter be fully discharged." These leases were assigned by Boyle to M. A. and D. Bettman, partners. No well was bored under said leases. For some time the rental was paid, and then there was a failure to pay the rent for about nine months. For several

months after the first failure to pay the monthly rental the Bettmans made no surrender of the lease, but finally did so. Roberts afterwards brought an action of covenant upon the leases for the purpose of recovering the unpaid monthly rentals. He recovered a verdict for the monthly rental of the whole period claimed by him. The court, upon a motion for a new trial, received a remittitur for that part of the verdict covering the monthly rentals after the surrender of the lease by the Bettmans, and gave judgment for the balance of the verdict,—that part of it which included rentals from the time when the Bettmans ceased to pay them up until the surrender. The Bettmans bring the case here by writ of error.

The question before us is, I think, one of great importance in this State. I surmise that there are many leases in this State containing similar clauses to those above given, and it is important that we give a fixed construction to them. The Bettmans advance the proposition that they could retain these leases without any formal surrender of their estate therein, and not bore for oil or gas, and not pay rentals, and that they could not be made to pay rentals because of the provisions in the leases themselves; in other words, that the very failure to pay would alone, under the leases, absolve them from liability for such monthly rental. If so, these leases are wholly one-sided. Where does the safety of the land-owner come in under such a construction? What does he get for making a lease for the very purpose of having his land developed, or, in default of development, to receive his rental? He gets nothing under this construction. The lessee pockets his lease, and awaits the chances of wealth from speculation, spending nothing. The landowner gets naught, but perhaps he has lost his all from having his land thus tied up. Shall we make such leases a delusion and a snare? Did the landowner ever dream that he was entering into a contract of the import which the Bettmans would assign to this contract? Indeed, did the lessees ever so regard it themselves? If it is capable of such a construction against the unwary, inexperienced landowner, it is a delusion and a fraud, which no court ought to enforce. But we can give a construction to such leases which will vindicate and

protect the rights of both sides to them. We can make the leases themselves speak a language and intention which shall subserve the purposes of right and justice. Let us look at the leases. They affirmatively stipulate for monthly payment to the lessee of a fixed rental until the completion of a well. Until the well is completed, that rental is the compensation given the landowner for having granted a monopoly as to oil and gas until a well comes in, and then it stipulates for the payment of a share of the oil or a fixed sum per gas well. The purpose here is plain. If we say that the failure to pay that rental monthly *ipso facto* releases the lessee from its payment, what is the use of the provision for payment? Why provide for payment, if failure to pay alone nullifies the provision for payment? The covenant to pay is brought to birth by the lease only to die at the hands of its mother. This construction renders the instrument self-contradictory. The lease cannot mean this nonsense. We must attribute some other meaning to it. If such be the meaning, where is the need of the clause giving the lessee right to surrender the lease at any time and discharge himself? If the other clause was intended to release him from the obligation to pay, this second clause, plainly made for the benefit of the lessee, would be useless. The clause stipulating for payment of rent is the only benefit which the lessor gets until development shall give him what moved him chiefly to make the lease, his share of oil, and he protected himself against the insolvency of the lessee, or his failure to pay, by the clause forfeiting the lease for failure to complete a well or to pay rental. That clause of forfeiture was designed for his benefit, and not for the lessee's benefit. It was the lessor's only safety. The clause giving the lessee a right at any time to surrender the lease and discharge himself from further liability is his ample shield. This construction gives all the clauses their fair operation. This construction is sustained by repeated decisions upon similar leases in the state of Pennsylvania. Those decisions are in a state where such questions have received more mature consideration, from the wide-spread prevalence of such leases, than in perhaps any other state, and they are entitled to great regard in other states; and I feel justified,

as we have large interests of the kind in this State, in making a somewhat prolonged reference to them.

In *Galey v. Kellerman*, 123 Pa. St., 491, (16 Atl. 474), the lease said that a failure to complete a well or make the payment in lieu of it "renders this lease null and void and to remain without effect between the parties hereto." The lessees neither developed the territory nor paid rental in lieu thereof, and claimed that, as the lease provided that such failure should "render this lease null and void," it must be treated as void, not from and after the default, but *ab initio*, so that a cause of action accruing before or by reason of the default was extinguished by the lease itself. The court said: "This construction overlooks the character of the agreement and the relation of its covenants. The lessees secured by it the exclusive right to operate for oil and gas. On their part, and as consideration for the grant, they agreed to begin operations within sixty days, and within three months complete the first well. If they failed to do as they agreed, they promised to pay for delay \$1,000 per annum. If they neither developed the land nor paid for their delay, they were, by such disregard of their contract, to forfeit all rights under it, and the lease was to be rendered thereby null and void. But the forfeiture did not happen until default. * * * The acts that forfeited their rights did not forfeit those of the lessor." The court held that the lessor could recover the stipulated rental for the time the lessees held the exclusive rights to operate. The court said that the construction contended for by the lessee transferred the punishment for the breach of the contract from him on whose default it arose to the injured party, and said: "We should need the constraint of insurmountable necessity to induce us to adopt the construction contended for."

In *Wills v. Gas Co.*, 130 Pa. St., 222, (18 Atl. 721), the lease provided that, on failure to drill a well within a specified time, the lessee should pay one thousand dollars annually in advance thereafter, and that failure by the lessee to perform any of his covenants should work an absolute forfeiture, and the lease shall thereupon become null and void; and it was held that said clause was intended for the

benefit of the lessor, and he had the option either to declare the forfeiture or affirm the continuance of the contract, and, if he did not choose to avail himself of the forfeiture, it could not be set up by the lessee as a defense to an action for the rent under the lease.

In *Leatherman v. Olliver*, 151 Pa. St., 646, (25 Atl. 309), the lease provided that the lessee should complete a well within six months, "or, in default thereof, pay to the party of the first part for further delay an annual rental of \$500, payable quarterly in advance;" and that "a failure to complete said well or pay said rental for ten days after the time above specified for so doing shall render this agreement null and void, and it can only be renewed by mutual consent, and no right of action shall, after such failure, accrue to either party on account of the breach of any promise or agreement herein contained;" and it was held that on failure to drill the well the lessor was entitled to the stipulated rental, and that the latter clause did not deprive him of his right of action, as by the latter clause the parties meant that the lessor could not re-enter and treat the rights of the lessee as forfeited or abandoned on the day the default happened, but that he must give the lessee ten days of grace to make payment before he could take advantage of the default to terminate the lease, and that the lessee could not compel the lessor to re-enter so as to terminate the lease for the lessee's benefit, and that the lessee was entitled to recover his rental.

In *Phillips v. Vandergrift*, 146 Pa. St., 357, (23 Atl. 347), the lease provided that a well should be completed within a fixed time, or, in default, the lessee should pay a yearly rental, and that failure to complete such well or pay said rental "shall render this lease null and void, and not to be revived without the consent of both parties;" and it was held that such covenant was for the benefit of the lessor, and that the lessee by his own act of default could not relieve himself from a liability already incurred.

In *McMillan v. Philadelphia Co.*, 159 Pa. St., 142, (28 Atl. 220), the lease said that a "failure to complete such well, or comply with any of the foregoing conditions, or to make any of such payments within such time and at such place as above mentioned, renders this lease absolutely

null and void, and no longer binding on either party, and will re-vest the estate herein granted in the lessor, and release the lessee from all his covenants herein contained, he having the option to drill said well or not, or pay said rent or not, as he may elect." Yet the court held that "this clause is for the benefit of the lessor, and he may assert the forfeiture or forbear to do so." The opinion says: "He [lessee] may drill the well, and so pay no rental, or he may pay the rental, and not be compelled to drill the well. It is not for the lessor, but it is for the lessee, to elect which he will do. This option was deducible from the stipulations of the lease, but the parties chose to put it in words and make it part of the contract. The contention of the defendant destroys the character of the whole contract. It makes the lessee say that he will drill a well within a given time, or, failing to do so, that he will pay a monthly rental, but that he will do neither unless it pleases him, and, if he does neither, he shall be liable in no manner for his breach of contract. Such a construction is so unjust and absurd that the words relied upon as requiring it must be plain and unambiguous, and must be incapable of an exposition in harmony with the body of the contract, before we can consent to adopt it." The same doctrine will be found in *Cochran v. Pew*, 159 Pa. St., 184, (28 Atl. 219).

In *Conger v. Transportation Co.*, 165 Pa. St., 561, (30 Atl. 1138), the lease contained the clause: "A failure on the part of the second party to make any of the payments within 10 days after the time hereinbefore stated, and in manner provided for, renders this lease null and void, and to remain without effect between the parties, and it can be renewed only by mutual consent, and no right of any action shall, after such failure, accrue to either party by reason of the breach of any promise or agreement herein contained." And it was held that, upon failure to drill the well within twelve months, the lessor was entitled to the stipulated rental for each year of delay.

Thus, I say that the true construction of this lease on its face is not that which the plaintiff in error asks us to give it. JUDGE DENT suggests, also, that we may presume that the parties by tacit, mutual consent continued the lease,

and this would entitle the plaintiff to recover his monthly rental until such tacit prolongation of the leases ended by the lessee's express surrender of them. I think this suggestion is fair and strong. It only adds strength to the conclusion which we reach, that the plaintiff was entitled to recover his rentals until the surrender of the leases.

It is assigned as error that the court allowed the plaintiff to release a part of the verdict. I do not see how, if there be no other error against the party complaining,—if the facts make him liable to the amount for which judgment was rendered,—it lies in his mouth to complain of a release. Without further discussion, I refer to *Ohio River Co. v. Blake*, 38 W. Va., 718, 725, (18 S. E. 957). We therefore affirm the judgment.

ENGLISH, JUDGE, (*dissenting*):

I cannot concur in the opinion of a majority of the Court handed down in this case, for the following reasons: William H. Roberts leased to W. D. Boyle, by separate leases, two tracts of land in Tyler County, W. Va., for the purpose and with the exclusive right of drilling for petroleum and gas, both leases being dated July 5, 1892, one of which tracts contained one hundred and twelve acres, and the other one hundred acres. About August 3, 1892, these leases were assigned to M. A. and D. Bettman, which assignments were signed by W. D. Boyle and William H. Roberts. The leases were thus transferred to said M. A. and D. Bettman, with all their covenants unchanged in any respect, except that the Bettmans were to pay the rentals instead of W. D. Boyle, which rents were to be paid at McCormick & Morrison's store, in Tyler County; and in these assignments by said Roberts and Boyle it was stated that a failure to pay these rentals for ten days for any month after they became due would render the said leases null and void, and they should be surrendered by Bettman & Bettman to Roberts, and the rentals should cease. No oil or gas was found on these tracts, and Bettman & Bettman notified Roberts that, unless he would reduce the rentals, they would surrender the property. This notice was given the latter part of November, 1892, and Roberts

replied, "All right; when you stop paying the rentals that ends the lease." By the terms of said lease, Bettman & Bettman were to pay one hundred dollars per month in advance until a well was completed, and it was positively agreed between Bettman & Bettman and Roberts that, when the rent was not paid when due, that fact of itself ended the leases, and neither should have the right of action against the other. On the 2d of October, 1893, said Roberts brought an action of covenant upon said two leases against Bettman & Bettman, partners, etc., making profert of the same, and purporting to set out the covenants and conditions therein contained in his declaration, claiming that eighteen hundred dollars of the rent became due and was owing to the plaintiff from said defendants, and still unpaid, contrary to the covenants in the two indentures contained, to the damage of the plaintiff three thousand dollars. On April 12, 1894, the defendants, by counsel, cravedoyer of the deeds described in the declaration, read to them, and demurred generally to the plaintiff's declaration, in which demurrer plaintiff joined. Demurrer was overruled, and thereupon the defendants pleaded covenants not broken, conditions performed, and payment, to which the plaintiff replied generally, and issue was joined thereon. The action of the court in overruling defendants' demurrer to said declaration is assigned as error. Was this assignment well taken, and did the court err in overruling said demurrer?

By cravingoyer of the leases sued upon, they became part of the declaration, and may be examined; and, when said leases are read and compared with the averments of the declaration as to the covenant they contained, it is perceived that in declaring upon said leases the pleader omitted in each instance, after the words, "and a failure to complete such wells or to pay said rental when due or within ten days thereafter, shall render the lease null and void," to insert the words, "and can only be renewed by mutual consent, and no right of action shall after such failure accrue to either party on account of any covenant herein contained;" which covenant is found in each of said leases made profert of in the declaration.

Let us next inquire what the effect is of cravingoyer of

the leases sued on, and we find in the case of *Jarrett's Adm'rs v. Jarrett*, 7 Leigh, 93, it was held that if, in an action on a deed, plaintiff makes profert of the deed in his declaration, and defendant takes oyer of it, the deed is thereby made part of the declaration, and defendant cannot object to the deed as evidence on the trial, on the ground of variance. When, however, these leases were, by craving oyer, made part of declaration, can we say that the court acted properly in overruling the demurrer to the declaration as then presented, the lease being made part thereof? The declaration avers that the defendants failed to complete a well on said leases, and also to pay the rental when due, or within ten days, which would operate to render such leases null and void, and place them in such condition that they could only be renewed by mutual consent; and it was further covenanted that no right of action should, after such failure, accrue to either party on account of the breach of any covenants therein contained. It cannot be successfully controverted that this action was brought in direct opposition to this covenant. It cannot be said that this covenant was intended solely for the benefit of the lessor, because the express language of the covenant is that no right of action after such failure should accrue to either party on account of the breach of the covenants therein contained, and this covenant is just as obligatory upon the parties as any other it contains. Beach on Modern Contracts (volume 1, § 151), in speaking of sealed instruments and consideration, says: "The statutes merely make it necessary for the courts to gather the intention of the parties entirely from the instrument. They substitute the intention of the parties for the form of the instrument." And in section 473 the author says: "By release of all actions, actions real, personal or mixed are discharged, and so are all causes of action." And in section 482 he says: "A bond or covenant not to sue is equivalent to a release." And at section 735, speaking of the construction of deeds, says: "The construction of deeds follows the rules of law in regard to the construction of other contracts in writing. A deed of conveyance, like all other instruments, will be read by the court in the sense of the meaning of the parties. The intention will prevail

wherever such intention is unmistakably manifested, having regard to all parts of the instrument. * * * In determining the meaning of the parties, recourse must be had to the whole instrument. * * * The intention as gathered from the whole instrument must prevail." Parsons on Contracts (volume 2, p. 622), speaking of the construction of contracts, says: "So, for the same reason, all the parts of the contract will be construed in such a way as to give force and validity to them." In the case of *Barber v. Insurance Co.*, 16 W. Va., 658, this Court held (third point of syllabus) that in the construction of contracts the provisions thereof shall be taken into consideration, and reconciled, if possible, so that the true intent of the parties to the contract may be ascertained.

The plain and manifest intention of the parties to these leases was to avoid litigation. The plaintiff having made profert of said leases, and the defendants, by craving oyer of the same, having made them part of the declaration, we must look to the entire deeds for the contract which is sought to be enforced; and the intention of the parties, as it is disclosed by the deeds, constitutes the contract; and this, when ascertained by proper construction of the contract, will be enforced by the court. Looking, then, at these leases as presented by the pleadings, can we discover any right thereby conferred upon the plaintiff to recover rent after failure on the part of the defendants to pay the same when due? On the contrary, all said in regard to payment of rental is as follows: "The said rental shall be deposited to the credit of the party of the first part at—, or paid direct to said first party; and a failure to complete such well, or to pay said rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall after such failure accrue to either party on account of the breach of any covenants herein contained." It was also agreed that the party of the second part should pay to the first party one hundred dollars per month in advance until a well was completed, from the date of said leases on each tract of land; and, further, that the party of the second part should have the right at any time to surrender said leases to the party of the first part, and thereafter should be fully discharged.

Now, even if it be true that the defendants suffered rent to accrue against them by their failure to surrender said leases promptly, yet it was expressly provided that a failure to pay said rental for ten days for any one month after it had become due, should make said indentures null and void, said rentals should cease, and the leases be surrendered. By the terms of the leases, the surrender of them was not a condition precedent to the ceasing of the rent, as stated in the declaration, but it was expressly provided, that, upon failure to pay the rent when due, or within ten days, the leases should be null and void, and could only be renewed by mutual consent, and no right of action should, after such failure, accrue to either party on account of the breach of any of the covenants therein contained; yet the plaintiff, by his declaration, claims rental for nine months after the alleged failure to pay. My conclusion, therefore, is that the plaintiff, on the face of his declaration, has shown that he is not entitled to sustain this action, and the court erred in overruling the defendants' demurrer, and judgment should have been rendered for the defendants on the demurrer.

Affirmed.

CHARLESTON.

DUNFEE *et al.* v. CHILDS *et al.*

Submitted February 7, 1898—Decided May 6, 1898.

1. BILL OF REVIEW—*Leave of Court—Newly Discovered Evidence.*

There need be no leave of court to file a bill of review based on error of law, but such leave is necessary when the bill of review is based on newly-discovered facts. (p. 157).

2. BILL OF REVIEW—*Motion for Reversal—Limitation.*

Three years is the limitation for a bill of review, and five years for a motion to reverse a decree by default. (BRANNON. PRESIDENT, fixes two years for both.) (p. 157, 161).

3. ERROR—*Decree—Payment Under Contract.*

It is error to decree payment of purchase money before the time fixed in the contract. (p. 163).

4. CREDITOR'S BILL—*Parties—Order to Convene Liens.*

Though a suit be brought by one judgment creditor only, to enforce the lien of his judgment, and though it does not make other judgment creditors parties, and though it be not in terms a suit for the benefit of the plaintiff and other judgment creditors, yet the court may make it a suit for all lienors by ordering an account of all liens to be taken, or on a reference to convene lienors any may prove their liens. Upon such order to convene liens it is a suit for the benefit of all presenting liens, though no mention of such liens be made in the bill. (p. 163).

5. NEW PARTIES—*Petition for Relief—Summons—Liens—Order to Convene Liens.*

Petitions for relief in a cause filed by new parties must have process against parties to be affected thereby; but, if they seek to enforce liens, and an order to convene liens is made, the liens stated in the petition may be presented to a commissioner without such process on such petition. (p. 163).

6. JUDGMENT LIEN—*Fieri Facias—Equity Pleading.*

A bill to enforce a judgment lien must state that a writ of *fieri*

45	155
49	290
49	730
50	835
50	867
50	401

45	155
51	103
51	568
52	574
52	580

45	155
53	398
53	424

45	155
54	494

45	155
55	589

45	155
59	227
59	243
60	385

45	155
61	219
61	557

facias has been returned "No property found," or that no execution issued within two years from the date of the judgment. This is not required as to judgments of date before the act of 13th March, 1891. (p. 163).

7. *SALE OF REALTY—Judgment—Rental.*

Before a sale of land can be made to satisfy judgments, it must somehow appear in the cause that it will not, in five years, rent for enough to satisfy the liens decreed. (p. 164).

8. *SALE OF REALTY—Purchaser's Rights—Decree of Sale—Reversal*

The reversal of a decree under which land is sold will not affect the title of the purchaser, if he is not a party to the suit, or, though a party, has no interest in the debt or cause for which the land is sold; but, if he is a party with such interest in the decree, his title falls with such reversal. If a decree confirming a sale be reversed for error in it, the purchaser's title falls, whether he be a party or not. Where necessary parties having title are not before the court, the purchaser's title falls with reversal of decree of sale. (p. 164).

Appeal from Circuit Court, Tyler County.

Suit by H. Childs & Co. and others against John R. Dunfee and another to enforce a judgment. There was a decree for plaintiffs. Defendant's bill of review was dismissed, and they appeal.

Reversed.

DAVID D. JOHNSON, for appellants.

ROBERT McELDOWNEY and S. B. HALL, for appellees.

BRANNON, PRESIDENT:

This was a chancery suit in Tyler County by H. Childs & Co. against Taylor and Dunfee to enforce a judgment against the lands of Taylor and Dunfee. There were other lienors not made parties, but they filed petitions seeking the enforcement of their judgments, and were made co-plaintiffs by order of the court. There were a purchase-money lien and a deed of trust on the lands. There was a convention of lienors under an order of reference, and a decree of sale, and a sale under it, and a decree confirming that sale. These decrees were decrees by default as to Taylor and Dunfee. Then came a motion to reverse the decree of sale for certain errors, which motion was overruled. Then came a bill of review, which

was dismissed, and this is an appeal to review the action of the court in dismissing the bill of review.

No leave of court to file the bill of review was given. It is based on error of law. The Virginia practice and ours has been to apply in the first instance for leave to file a bill of review, whether it be error of law apparent in the decree or upon discovery of new matter; but the general chancery practice elsewhere, while requiring leave to file a bill of review for matter newly discovered since the decree, does not require such previous leave to file bills of review based on error in law. The matter has never been actually settled in this State, as JUDGE ENGLISH states correctly, in *Riggs v. Huffman*, 33 W. Va., 430, (10 S. E. 795); and I think that JUDGE ENGLISH was right in indicating the opinion in that case that no good reason exists why the English practice, which dispenses with such previous leave, should be changed, and therefore I hold that such previous leave is not required. It is true that section 5 chapter 133, Code 1891, does contain the clause, "A court or judge allowing a bill of review may award an injunction to the decree to be reviewed;" but the use of the word "allow" in that clause does not necessarily mean that previous leave must in all cases be had. The clause may receive a reasonable construction in saying that it applies where the party wants not merely a bill of review, but also an injunction to supersede the execution of the decree complained of. Besides, the court recognized the bill of review by acting upon it, thus dispensing with the necessity of previous leave to file it.

The bill of review was filed more than two years after the decree, but not more than three years. Was it barred? Until chapter 157, Acts 1882, the limitation of an appeal to the Court of Appeals was five years, and that of a bill of review three years; and, the legislature having reduced the limitation for an appeal to two years in 1882, leaving chapter 133, section 5, standing without repeal by express reference to it, it may be claimed that three years is still the limitation of a bill of review for error of law. A bill of review is a mode of reversing a final decree for two causes,—one, error of law apparent on the face of the decree; the other, for new-

ly-discovered matter. *Amiss v. McGinnis*, 12 W. Va., 371. This bill rests on error of law, not newly-discovered matter. For error of law apparent in a decree you may have either an appeal or bill of review. Now, if you ask an appeal to the Supreme Court, and the decree is older than two years, you are refused it; and yet, if the bill can be maintained, you can go back to the circuit court, if the decree be not over three years old, get a bill of review, and reverse it. This cannot be. Surely, you cannot reverse it for the same error in the circuit court which could not reverse it in the Supreme Court. By the act of 1882, an error, after two years, is cured; the decree stands forever valid. If for an error which would be reversible on an appeal taken in time, but cannot be reversed on appeal because barred, you can yet reverse on bill of review, see where it would lead. After two years, but within three, you ask an appeal to the Supreme Court, and it is refused because barred. Then you get a bill of review, and after years it is dismissed by the circuit court. Then you get an appeal from the decree dismissing the bill of review, and the Supreme Court thinks there was error in the first decree for which the circuit court ought to have reversed it on bill of review, and reverses the first decree,—reverses it perhaps ten years after its date. Thus, under this theory, is a decree reversed ten years after its date in the very teeth of the act of 1882, plainly intending that no decree shall be reversed for error after two years. This cannot be. Why? Because the two acts conflict, and the latter prevails. Though section 5, chapter 133, limiting bills of review to three years, is not repealed by mention, it is repealed by inevitable implication, under principles of reason, and consistently with well-settled rules of interpretation of statutes. The two sections squarely conflict. One (the latter) says that an appeal shall not lie after two years,—that is, an error in it cannot be redressed after that time; the other gives three years. They both operate on the same matter,—the erroneous decree. Reason says one must give way, and that is the older one. Look at authority. “Where two statutes on the same subject conflict, the latter shall have precedence.” *Edgar v. Greer*, 74 Am. Dec., 316; *Towle v. Marrett*, 14 Am. Dec. 206, note,

p. 209. When a conflict is seen, the older provision ceases without a repealing clause in the later act. 23 Am. & Eng. Enc. Law, 479. How can we doubt that the legislature in 1882 designed one, and only one, limitation on all proceedings to reverse an erroneous decree? It is the error that is barred, not simply the process. Where, for a given error, there are two concurrent remedies, it was not intended to fix different limitations for them. From early in the century the legislation of Virginia and this State gave an appeal longer duration than a bill of review; but now, under the theory claimed, the latter has longer time. Why a difference? Why give the inferior court longer time? The legislature designed to fix two years as the limit upon an error in a decree or judgment. If it did, that displaces former limitation, and brings the bill of review under analogy to the appeal, as it was before it had a limit. *Shepherd v. Larue*, 6 Munf., 529, 531. The United States Supreme Court has said in *Daviess v. Fairborn*, 3 How., 636, that, "though a later act be not repugnant to the provisions of a former one, yet, if it is clearly intended to prescribe the only rule which should govern, it repeals the prior act." Approved by Moncure, J., *Fox v. Com.*, 16 Grat., 11. "A later statute, the evident intent of which is to furnish the exclusive rule governing a certain case, repeals by implication an earlier law on the same subject. If the co-existence of two sets of affirmative provisions would be destructive of the object for which the later set was passed, or if the same right would be made dependent on conflicting conditions (two remedies), the earlier set would be repealed by implication by the later." 23 Am. & Eng. Enc. Law, 484, cl. c. Apply this rule. The act of 1882 intended to give a man for whom a decree is rendered peace after two years; but, if you can disturb him by bill of review in three years, how can you harmonize the two provisions? They do not apply to different matters, but to one only,—the reversal of a decree for a given error. The error is the cause of action. They are irreconcilable. Both cannot stand together. Apply the last clause further. The redress against this one error would depend on whether you had recourse to an appeal or bill of review. This cannot be. By adopting the

rule I contend for, you further reason, and harmonize both sections and remedies, whereas the rejection of this rule leads to chaos and unreasonable results. I repeat, the act of 1882 acted on the error itself, not merely on the remedy of two concurrent ones you might choose. It intended repose after two years. Sutherland on Statutory Construction (section 138) says that repeals by implication are recognized as intended, just as well as express repeals, by the legislature, though not expressed; and "its intention to repeal is ascertained as the legislative intent is ascertained in other respects, when not expressly declared,—that is, by construction. The implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and effect of an earlier act. In such case the later act prevails as the last expression of the legislative will. Therefore the former law is constructively repealed, since it cannot be supposed that the lawmaking power intends to enact or continue in force laws which are contradictions." So said also Judge Moncure in *Fox v. Com.*, 16 Grat., 9. It will not do to say that the legislature has left the section limiting a bill of review untouched. It has not touched it in express words of reference to it, but it has in construction and reason, by saying the legislative intent was that all error should be barred of redress after two years, attack it in what guise or mode you say. Another view: In 1882 the legislature made a new limitation against relief against erroneous decrees, covering that subject entirely. That repealed the former rule in all respects, being intended as a substitute for it. *Herron v. Carson*, 26 W. Va., 62; 23 Am. & Eng. Enc. Law, 484; *Fox v. Com.*, 16 Grat., 1.

Another view: The act of 1882 (chapter 157) which says no appeal, etc., shall be taken after two years,—that is, no erroneous decree shall be reversed,—is a negative, prohibitory statute. It favors the argument of repeal by implication more than if affirmative. Affirmative acts are "generally cumulative; the other displaces existing rules." *Suth. St. Const.* §§ 202, 203. But I notice that the last section of the act of 1882 contains a repealing clause by the language, "All acts, and parts of acts coming within the purview of this act, and inconsistent therewith, are here-

by repealed." Sutherland on Statutory Construction (section 137) says: "Where a statute repeals all former laws within its purview, the intention is obvious, and is readily recognized, to sweep away all existing laws upon the subjects with which the repealing act deals. The purview is the enacting part of a statute, in contradistinction to the preamble; and a repeal of all acts within the purview of the repealing statute should be understood as including all acts or parts of acts in relation to all cases which are provided for by the repealing act, and no more." Now, does not the act of 1882 provide a limitation for the reversal of a decree,—the same matter to which the section as to a bill of review relates? The matter is within the purview of the act of 1882. Then, is the later act inconsistent with the older provision? Yes, because it provides a different limitation,—a shorter one. The two are conflicting. The legislature knew there might be acts, or parts, inconsistent; and, though it did not specify, yet it said it did not intend them to continue if inharmonious with the meaning, spirit, and purpose of the later act. My position, then, is that for error of law on the face of a decree the limit to a bill of review is two years, because an appeal for that error has been reduced to two years. A bill of review for new matter is different, perhaps, because that cannot be made the subject of an appeal, and is not touched by the act of 1882. A repeal by implication is only so far as the later act, in its operation, conflicts with the older. 23 Am. & Eng. Enc. Law, 479. It is absurd to say that for a given error there is no redress in the Court of Appeals, though within two years it would be effective there, and turn round and let the circuit court redress it. This ought not to be so, and is not so.

Another important question arises. More than two, but not five, years had elapsed before the motion to reverse the decree. Was that motion barred? What is said above as to a bill of review largely applies to the present question. This motion is a process acting on matter of error in the decree. It cannot be that the legislature intended to give five years for a motion to reverse by one who did not appear, and only two years for an appeal by one who did appear. Remissness and negligence to de-

send the cause thus get three years' advantage over diligence, and then further, the defendant who did not appear has two years more to apply for an appeal; indeed maybe much more, if we give him a right to appeal from the decree refusing to reverse, making it the basis of an appeal, as I think we must, because the law denies him an appeal until he makes the motion to reverse and fails, and, of course, the statute limiting an appeal to two years ought not to run against him while he prosecutes his motion; and, moreover, the statute gives him this remedy by motion, and surely an error committed by the court in deciding it ought to be the basis of an appeal. A decree dismissing a bill of review is the basis of an appeal, as it lies within two years from dismissal (*Middleton v. Selby*, 19 W. Va., 267), and on parity of reasoning a decree dismissing a motion to reverse must give basis and date for an appeal. See, then, to what unequal, unfair results it would lead to hold that five years is yet the limitation of such motion. The act of 1882, limiting appeal to two years, limits this motion as it does bills of review. When the Code was enacted, it gave an appeal for five years for those who had appeared and same time for a motion for those who had not appeared. The intent was to make a like limit for both. It ought to be so now by construction. It adds to the force of this position to remember that the Code says that on motion, in cases of decrees by default, the court may reverse for any cause for which on appeal this Court could reverse; but if we allow five years we allow reversal on motion for causes which would not be ground of reversal on appeal, because barred. On these grounds the able circuit judge dismissed the motion and bill of review, as he states in the decree. I think these views correct. I know they are not beyond question, but they are sufficiently plausible to warrant their adoption, particularly as they would obviate the intolerable evil of preserving the old limitation for bills of review and motions to reverse. But the other judges do not concur therein, and therefore I proceed to inquire whether there is error in the decree complained of.

It is said the court erred in the original case in accepting as good the return of process signed, "S.

G. Pyle, Dep. for O. W. O. H. S. T. C." Immediately below is a return as to other parties, signed, "S. G. Pyle, Dep. for O. W. O. Hardman, S. T. C." The letters for the name Hardman would perhaps not be bad, but when both returns are read together, we think the return complained of is good. Service is presumed to have been made in Tyler County. *Bensimer v. Fell*, 35 W. Va., 15, (12 S. E. 1078).

There is error in decreeing against the debtors a debt for purchase money long before it was due, as it violates the contract, and puts on the debtor the burden of premature payment.

This suit was not, in terms, a suit by one judgment lienor for the benefit of himself and other lienors, but only for himself; nor were they made defendants. But Code 1891, c. 139, s. 7, allows it to be so treated by allowing all lienors to prove their judgments, and, besides, the court ordered a reference to convene all liens, and that made it a suit for all, as if it had been brought for all, or all had been made defendants. *Livesay v. Feamster*, 21 W. Va., 83; *Jackson v. Hall*, *Id.* 601. This statute relates to procedure only, and would apply to past cases; but the law before it made the suit, after such reference, a general lien suit. However, these lien creditors came in by petition, and were properly entertained, under the cases above cited.

The point is made that no process issued on the petitions. It must be understood that the practice of simply filing a petition in a case of somebody else, and taking a decree for a debt or other relief prejudicial to a party without process on the petition, is bad. *Morgan v. Morgan*, 42 W. Va., 542, (26 S. E. 294). But it is immaterial in this case, as the parties proved their debts before the commissioner under the reference, which they could do without a petition. The statute gave power on such a bill, without any matter in the bill touching such liens, to prove the liens, thus making an exception to the general rule that matter in the pleadings will alone justify a decree of relief.

There can be no question under the act of March 13, 1891 (Code 1891, c. 139, s. 7), that a bill to enforce a judgment lien must show a return of a *feri facias*, "No

property found," or that no execution issued on the judgment within two years from its date, else it will be open to demurrer, because only a statute gives this suit, and that makes such conditions. But this suit was begun before that statute, under a law giving right to bring such suit without previous execution (*Marling v. Robrecht*, 13 W. Va., 440, Syl. point 6), and this act of 1891 cannot receive a retroactive effect to destroy a suit properly brought before it. *Walker v. Burgess*, 44 W. Va., 399, (30 S. E. 99); *Burns v. Hays*, 44 W. Va., 503, (30 S. E. 101).

There is nowhere a showing that the rents would not satisfy the debts in five years. Code 1891, c. 139, s. 7, declares that it must somehow appear that they will not do so before a sale can be had. There is error in the decree in this respect. This has been the law since the act of 1882, if not before.

Another error in the decree is that the land decreed to sale had been sold by Stone and others to W. T. Taylor, the contract providing that if, when the purchase price should be paid, John Taylor, father of W. T. Taylor, should be living, the property was to be conveyed to him, but, if dead, then to W. T. Taylor; and thus John Taylor has a vested contingent estate in the equitable title, and both legal and equitable title, if in different persons, should be before the court. All parties in interest in the title must be before the court. If the father survived the son, the father could relitigate the debt for the purchase money, as he could not be bound by the decree. The purchaser would be jeopardized, and the vendor and W. T. Taylor would be prejudiced by the tendency of the absence of John Taylor as a party to produce a sacrifice of the property at the sale, as a cloud would be hanging over the title.

Another question of importance arises. Hardman purchased the land under the decree, and he was a party to the suit, having filed a petition claiming debts against the land, which were decreed in large amounts to him, and it is claimed that, while a stranger, purchasing under a decree, would be protected in his title against loss by reason of the reversal of the decree, yet, if a party purchased, his title is lost by a reversal. Section 8, chapter 132, Code

1891, says that the purchaser's title shall not be affected by the reversal of the decree. As this question stands, unaffected by any statute, as the law has been stated by the United States Supreme Court and by courts very generally, a stranger to the suit, purchasing upon the faith of a decree in the public courts of the country, where the court has jurisdiction of the subject and the parties, and the parties whose title is affected are before the court, cannot be disturbed in his title by the reversal of the decree. This is a plain principle of policy and justice. Per Baldwin, Judge in *Voorhees v. Bank*, 10 Pet., 449; *Gray v. Brignardello*, 1 Wall., 627; *Thompson v. Tolmie*, 2 Pet., 168; *McGoon v. Scales*, 9 Wall., 23; Ror. Jud. Sales, § 608; *Bank of U. S. v. Bank of Washington*, 6 Pet., 8. In Virginia earlier cases are to the reverse, and the tendency of the current of decision is the reverse. *Durrett v. Davis*, 24 Grat., 317. Perhaps it is more correct to say that it is an open question, though some late cases favor the rule above stated. *Cocke v. Gilpin*, 1 Rob. (Va.) 41; per Lee, Judge in *Parker v. McCoy*, 10 Grat., 605; per Moncure, Judge in *Durrett v. Davis*, 24 Grat., 317; and *Daniel v. Leitch*, 13 Grat., 210; opinion in *Zirkle v. McCue*, 26 Grat., 517, 527; See, on the subject, opinion in *Hull v. Hull*, 26 W. Va., 30. Now it is regulated by statute. Chapter 132, section 8. Cases holding title good by reason of statute: *Cooper v. Hepburn*, 15 Grat., 569; *Capehart v. Dowery*, 10 W. Va., 130. Where the error is not in the decree ordering the sale, but that confirming it, section 8, chapter 132, does not protect the purchaser's title, and it falls upon reversal of the decree. *Sinnett v. Crolle*, 4 W. Va., 600. This case is a recognition that the law in this State is that, but for a statute, the title of the purchaser would fall upon reversal of the decree. Where necessary parties are not before the court, the statute does not protect the purchaser's title, but it falls with reversal. *Turk v. Skiles*, 38 W. Va., 404, (18 S. E. 561). Though a stranger purchasing is protected by the statute, it was certainly the law before it that, if a party interested under the decree were the purchaser, his title would fall with its reversal. *Buchanan v. Clark*, 10 Grat., 164; Bart. Ch. Prac. 1095; 2 Daniell, Ch. Prac., 1276. In *Galpin v. Page*,

18 Wall., 374, Justice Field, though expressing dissatisfaction with it, admits that such is the law. I am of opinion that said statute will not protect the title of a purchaser who is a party and the owner of the debt decreed against the land for which the land is sold. Merely being a party would not alone disturb his purchase, but, if the decree goes to his benefit, it is otherwise. The same reason does not exist for protecting him as an innocent third person. He moves the proceeding. Shall they who procure an erroneous decree, and under it get the defendant's property, hold fast to the fruits of that erroneous decision? Must not he make restitution of all he yet has in hand? Justice would say so. "A party obtaining any advantage through the judgment before reversal must restore what he got to the other party after reversal," said the court in *Reynolds v. Harris*, 14 Cal., 680. The supreme court of Missouri said: "The restitution to which the party is entitled upon the reversal of an erroneous judgment is of everything which is still in the possession of his adversary. Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under execution, and the judgment is afterwards reversed, so far as he is concerned, his title is at an end, and the land or goods must be restored in specie; not the value of them, but the things themselves. There is an exception where the sale is to a stranger *bona fide*, or where a third person has *bona fide* acquired some collateral right before reversal." *Gott v. Powell*, 41 Mo., 416. See *Bank of U. S. v. Bank of Washington*, 6 Pet., 8; Ror. Jud. Sales, § 1142; 12 Am. & Eng. Enc. Law, 229, note; *Corwith v. Bank*, 86 Am. Dec., 793. The Texas court said such a purchaser is one with notice of the error in the judgment, *Stroud v. Casey*, 78 Am. Dec., 556; *Gould v. Sternburg*, (Ill. Sup.) 21 N. E. 628; *Welcker v. Staples*, (Tenn. Sup.) 12 S. W. 340; 2 Freem. Judgm. § 482. I cannot think the act was intended to reverse this principle, and aid the party active in the procurement of a wrong decree or judgment in perpetuating that wrong, and reaping the fruits of that wrong, made at his instance, and thus promoting injustice. The purpose of the statute was to reverse what had been the rule in Virginia,—that

in every instance of reversal the title was annulled, no matter whether the purchaser was a party or a stranger to the case,—and it was not intended to go so far as to protect the party procuring the erroneous decree for a debt, and purchasing under it. Since writing the above, I have found *Martin v. Smith*, 25 W. Va., holding that, where the purchaser is a party, the sale will be set aside. See page 586. Therefore we reverse the decree dismissing the bill of review, and overrule the demurrer thereto and remand the case for further proceedings.

Reversed.

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SEPTEMBER TERM, 1898.

CHARLES TOWN.

BANK OF BERKELEY SPRINGS v. GREEN *et al.*

Submitted February 12, 1898—Decided September 11, 1898.

DEED—*Trusts—Cestui Que Trust—Quantity of Estate.*

G. conveyed by deed of general warranty to V, a tract of land, upon the following trust: "That the party of the second part, hereby agrees and covenants that he will take, hold, and stand seised of the above-described real estate to and for the only, sole and separate use, behoof, and benefit of Mary E. Green, wife of the said Charles S. Green, so that the said Charles S. Green will not sell, mortgage, charge, or incumber the same by way of anticipation or otherwise; that the said Mary E. Green shall receive the rents and profits arising from the said property, or such person or persons as the said Mary E. Green shall by her order in writing direct and appoint to receive the same, during the joint lives of the said Chas. S. Green and Mary E. Green, his wife; and upon the decease of the said Chas. S. Green, in case his wife should survive him, then the said Mary E. Green, his wife, shall immediately take and hold the property hereinbefore described, to her and the heirs of herself forever; and upon this further trust and confidence, that the said Mary E. Green may devise and dispose of the above-described property by her last will and testament, or by a paper in the nature of a will, as if she were a *feme sole*, and that she may otherwise dispose of the same by the consent of her trustee, and joining with him and her said husband in a conveyance of the same or any part thereof." *Held*, that said deed conveys to Mary E. Green an equitable estate in fee. (pp. 169, 176).

Appeal from Circuit Court, Morgan County.

Bill in equity by the Bank of Berkeley Springs against Charles S. Green and others. From a decree sustaining a demurrer to the bill, and a judgment dismissing the cause, plaintiff appeals.

Affirmed.

W. H. TRAVERS and J. HAMMOND SILER, for appellant.
FLICK, WESTENHAVER & BAKER, for appellees.

MCWHORTER, JUDGE:

On the 18th day of May, 1884, Charles S. Green conveyed, by deed of that date, to T. G. Vandike, upon consideration of the use and trust therein created, and the further consideration of one dollar, with general warranty, a certain tract of three acres of land, more or less, lying and being in the new addition to the town of Bath, in Morgan County, with proper description, "in trust, however, and upon this confidence, that the party of the second part hereby agrees and covenants that he will take, hold, and stand seised of the above-described real estate to and for the only, sole, and separate use, behoof, and benefit of Mary E. Green, wife of the said Charles S. Green, so that the said Charles S. Green will not sell, mortgage, charge, or incumber the same by way of anticipation or otherwise; that the said Mary E. Green shall receive the rents and profits arising from the said property, or such other person or persons as the said Mary E. Green shall by her order in writing direct and appoint to receive the same, during the joint lives of the said Charles S. Green and Mary E. Green, his wife; and upon the decease of the said Chas. S. Green, in case his wife should survive him, then the said Mary E. Green, his wife, shall immediately take and hold the property hereinbefore described, to her and the heirs of herself forever; and upon this further trust and confidence, that the said Mary E. Green may devise and dispose of the above-described property by her last will and testament, or by a paper in the nature of a will, as if she were a *feme sole*, and that she may otherwise dispose of the same by the consent of her trustee, and joining with him and her said husband in the conveyance

of the same or any part thereof,"—which deed was duly acknowledged and recorded.

Mary E. Green died October 3, 1889, intestate, leaving surviving her Nannie L. Green and John V. Green, her children,—the latter an infant,—without having in any way disposed of said property. At the June rules, 1897, the Bank of Berkeley Springs filed its bill in chancery in the clerk's office of the circuit court of Morgan County, suing for itself and such other lien creditors of Charles S. Green as should come in, take part in and share the costs of the suit, alleging that upon the death of Mary E. Green the said real estate, by operation of a resulting trust, became the property of said Charles S. Green, and subject to the liens set out in the bill; that the rents and profits of the land would not satisfy the liens in five years; and praying for an account to ascertain the liens and their priorities, and for sale of the property to pay the same, and for general relief. Defendant Nannie L. Green demurred to the bill, in which plaintiff joined, and the demurrer was argued and submitted, when the court, on the 1st day of September, 1897, decreed as follows: "And the court, having maturely considered all the matters of law arising on such demurrer, is of opinion that on a proper construction of the deed dated May 19, 1884, made by Chas. S. Green to T. G. Vandike, trustee, for the use and benefit of M. E. Green, an office copy of which is filed, as Exhibit No. 2, with the plaintiffs' bill, the said M. E. Green took an equitable estate in fee simple in the property thereby conveyed, which the plaintiffs are seeking by their bill to subject as the property of C. S. Green, and that on the death of said M. E. Green a life estate only, as tenant by the courtesy, vested in the said C. S. Green, her husband, and that the fee vested in the children of M. E. Green, as her heirs at law; and the court being of the opinion, further, that on the death of C. S. Green all interest on his part in the real estate involved in this suit ceased and determined, the court, upon consideration thereof, and for these and other reasons appearing on the face of the plaintiff's bill, doth adjudge, order, and decree that the demurrer to the said bill be, and the same is hereby, sustained. And, the plaintiff not asking leave to amend its bill, it is

further adjudged, ordered, and decreed by the court that the plaintiff's bill be, and the same is hereby, dismissed, and that the defendants do recover of the plaintiff their costs in the prosecution of their defense in this behalf expended." From which decree plaintiff appealed to this Court, assigning as error that the court should have overruled the demurrer: "(1) Because, under the provisions of chapter 71, section 8, of the Code of West Virginia of 1891, applicable to the case, the deed in question must be construed with reference to the intention of the party grantor (C. S. Green), and the said intention is manifestly to give to the beneficiary, Mary E. Green, (a) the right to collect the rents and profits of the realty during the joint lives of herself and her husband; (b) that only in case of the death of her said husband, she living, should the said property vest in her and her heirs; (c) that power of disposition or alienation was given to her upon condition that she should devise it, or otherwise dispose of it, during the joint lives of herself and her husband, by the consent of her trustee, who, with her husband, should join with her in such disposition. (2) She not having survived her husband, not having disposed of the property by will or any paper in the nature thereof, and not having alienated the said property by the consent of her trustee joining with her and her husband with conveyance thereof, there was a resulting trust in favor of the grantor, the said Charles S. Green, which should be subject to the lien of the judgments set out in the bill. The statute above referred to, and under which the question in this case arises, is in *totidem verbis* with the statute of Virginia from which it has been taken (Code Va. 1873, c. 122, s. 8), and has been construed by the court of appeals of that state. Professor Minor (2 Minor, Inst. p. 828) thus refers to this decision: 'In *Humphrey v. Foster*, 13 Grat., 653, 656, a noteworthy construction of this statute occurs. In that case Humphrey, by deed of 23d June, 1820, conveyed to his wife, forever, certain lands, to have and to hold the said lands for life; and the question was whether by the deed she took an estate for life, or in fee simple. It is admitted that if the deed had been to the wife and her heirs, *habendum* to her for life, the wife would, by the first clause, have taken at

common law a fee simple, and the *habendum* would have been repugnant and void; and it was also admitted that under the statute above cited the wife, notwithstanding the want of words of limitation, would, if the first clause stood alone, have taken a fee simple, but it could be treated as a fee simple in virtue of the statute only, and by the statute the whole deed must be looked to for the purpose of ascertaining whether there is any qualification or limitation upon the generality of the first provision, for such a deed can only convey the fee simple if a less estate be not limited by express words, or as it stands in our present Code, unless "a contrary intention appears by the conveyance," etc. And in the case under consideration a less estate was limited by express words, namely, an estate for the wife's life. It was therefore concluded that the deed conveyed but a life estate to the wife. Of course, where 'a contrary intention [which we contend is the case here] appears by the conveyance,' the same result follows. In such a case a resulting trust ensues as a legal consequence. Professor Minor (2 Minor, Inst. 189) defines such trust, among other instances, 'Where land is conveyed in trusts which fail of taking effect.' Judge Story, with more elaboration, says (1 Story, Eq. Jur. § 1200); 'The same principle applies to cases where the whole estate is conveyed or devised, but for particular objects or purposes, or on particular trusts. In all such cases, if those objects or purposes or trusts, by accident or otherwise, fail and do not take effect, or if they are all accomplished, and do not exhaust the whole property, then a resulting trust will arise for the benefit of the grantor or devisor or his heirs.'"

Section 8, chapter 71, Code, provides: "Where any real estate is conveyed, devised, or granted to any person without any words of limitation, such devise, conveyance, or grant shall be construed to pass the fee simple or the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless a contrary intention shall appear by the will, conveyance, or grant." In the light of this statute we must view the deed in controversy, and to which only can we look, together with the situation of the parties, and the motives inducing the con-

veyance, to arrive at the intention of the grantor when he executed the deed. Chas. S. Green, the grantor, had a wife and two children, for whom he evidently wanted to provide against his own mistakes in business, or the temptations he might have to incumber his property, and thus put it out of his power to give his family such support as he desired them to have. The very language of the first part of the trust created shows the solicitude he had on this point: That the trustee "should take, hold, and stand seised of said real estate, to and for the only, sole, and separate use, behoof, and benefit of M. E. Green, wife of the said C. S. Green, so that the said C. S. Green will not sell, mortgage, charge, or incumber the same by way of anticipation or otherwise;" thus clearly intending to get the property entirely beyond his reach, as well as that of his creditors. Can it be conceived that the grantor intended to so limit the estate conveyed, by a reversionary or other interest in himself, that at the very time his helpless children might most need this provision for their maintenance and support the property so conveyed should be brought within the grasp of the creditors of the grantor? Both appellant and appellees agree that the intention of the grantor in the conveyance and creation of the trust must be the guiding star in arriving at the true solution of the issue involved, and that, if possible, that intent must be obtained from the deed itself, taken altogether. In *Devl. Deeds*, § 836, it is said, "The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention, if practicable, when not contrary to law." What was the motive which induced the grantor to make this provision for his family? The record does not disclose of what other property, if any, C. S. Green was possessed at the time of the conveyance, or whether he was indebted to any extent at the time; but the presumption is that he was solvent, as no creditors seem to appear to question his voluntary conveyance. So that he is presumed to have made this wise provision for them while he was in condition to do so without fraud of the rights of any. This conveyance is for the only, sole, and separate use, behoof, and

benefit of Mary E. Green, wife of the said Charles S. Green, so that the said C. S. Green will not sell, mortgage, charge, or incumber the same by way of anticipation or otherwise, and providing that said Mary should receive the rents and profits arising therefrom, or should by writing direct and appoint such person or persons to receive the same as she might elect.

Appellant cites in its petition, as well as in its brief, the case of *Humphrey v. Foster*, 13 Grat., 653, as applicable to this case. In that case Judge Allen, in delivering the opinion of the court, said: "In the present case we perceive by the *habendum* that an estate for life was expressly limited; and as the object, under the statute, is to ascertain what estate was to be granted by the deed, if a less estate than a fee is limited by express words in any part of the deed it must control and qualify the general words used in the premises." Here the estate for life was expressly limited in language that could not be misunderstood. Point 1 of the syllabus in that case reads: "A deed conveys land to the grantee forever, to hold for life. As the premises would only convey a fee by virtue of the statute, and by the statute the whole deed is to be looked to to ascertain what estate is intended to be passed, the *habendum* in this deed is not void, but only a life estate passed by the deed." In the case at bar there is no clear-cut expression of limitation of estate, as in that case, nor such words nor expression as can reasonably be construed into such limitation. We are told by appellant that "it is manifest that the construction of the statute in both the *Humphrey* Case and the one now under consideration is precisely the same." In the sense that "the intention collected from the deed, will, or grant, governs and determines the question," this is true; but in the one case we have the intention expressed in unequivocal language, susceptible of but one construction, while in the other a most ingenious and erudite argument is required and made on behalf of appellant to wrench from the provisions of the deed the semblance of an intention on the part of the grantor to limit the estate conveyed. It seems to be a well-settled rule, in case of doubt or ambiguity in a deed, that the same shall be construed most strongly against the grantor. In *Car-*

rington v. Goddin, 13 Grat. 587, Syl., point 3, it is held: "The deed will be construed more strongly against the grantor, and so as to give it effect, rather than that it should be void for uncertainty." In that case it was doubtful, on the face of the deed, whether one or two parcels of land were intended to be conveyed. So it was accordingly construed to pass both.

Appellant insists that by reason of the law as laid down in point 1 of the syllabus in the case of *Radford v. Curwile*, 13 W. Va., 572, the clause in the deed, "that the said Mary E. Green shall receive the rents and profits arising from the said property, or such other person or persons as the said Mary E. Green shall by her order in writing direct and appoint to receive the same, during the joint lives of the said Charles S. Green and Mary E. Green, his wife, and upon the decease of the said Charles S. Green, in case his wife should survive him, then the said Mary E. Green, his wife, shall immediately take and hold the property hereinbefore described, to her and the heirs of herself forever," could have no other meaning or intention "than to be a limitation or restriction upon her power of alienation, since, if there was no such purpose, but the intention was to give her an equitable fee simple, such a title necessarily, and as a legal consequence, carried with it and secured to Mary E. Green the right to the use and enjoyment of the rents and profits during coverture, and it was utterly needless and meaningless to provide specifically for the enjoyment of them by her during the joint lives of herself and husband." It is true that Mary E. Green might have enjoyed the rents and profits under the conveyance without the special provision therein referred to, but it must be remembered that, theretofore, to secure to a married woman in a conveyance the rights of a *feme sole* required great care; and the ordinary attorney, in preparing such a paper, felt much as he would walking on thin ice, and his main object was to get into the instrument sufficient provisions to accomplish his purpose in carrying out the intention of the grantor in making the conveyance. This provision was evidently intended to secure to Mrs. Green the control and enjoyment of the rents and profits during the life of the grantor, which perhaps was unnec-

essary as the law was at the time of the conveyance, but was a precautionary provision which was in harmony with the law. Formerly the law was that, while the *corpus* of her real estate remained hers notwithstanding coverture, yet the marital rights of the husband entitled him to the rents and profits, unless the property was made her separate estate, in which event the rents and profits were hers; and while at law her contracts were absolutely void, still in equity she might charge, incumber, or otherwise dispose of the rents and profits of her separate estate. If the intention of the grantor was to limit the estate conveyed to less than an equitable estate in fee to Mrs. Green, it could have been done in a few words, which would have needed no judicial construction.

In *Walke v. Moor*, 30 S. E. 374, Syl., point 1, the supreme court of appeals of Virginia held that "a deed conveying land in trust for the sole benefit of the grantor's wife and her children, with power to the trustee, upon request of the wife, in writing, to sell the same, and reserving to the wife the right to dispose of the property by will, conveys to her an equitable estate in fee, to the exclusion of the children." The trust created in that case was as follows: "To hold all of the said property, real and personal, * * * for the sole and exclusive benefit of Virginia Baughan [the wife of the grantor] and her children, with power to the said Alvis [trustee], at any time when he shall be so requested by the said Virginia in writing, deeming it for the benefit of the said Virginia and her children, to sell all or any part of the above-conveyed property, real or personal, on such terms as he may deem judicious, and reinvest the proceeds of sale in any other property selected by her, or deemed more profitable to her and her children by him, the said Alvis; reserving to the said Virginia Baughan the right to dispose of all of the said property, both real and personal, by instrument of writing in the nature of a last will and testament." See, also, *Nixon v. Rose*, 12 Grat., 425; *May v. Jones*, 20 Grat., 692. In *Shermer v. Shermer's Ex'rs*, 1 Wash., (Va.) 266, John Shermer by will devised to his wife the use and profits of his whole estate, both real and personal, during her natural life, and after that was ended, then the whole of

his estate, exclusive of that already given to his wife, to be equally divided between whomever his wife should think proper to make her heir or heirs, and the testator's brother, Richard. The wife died a few days after the testator, without making any disposition or appointment of her part of the estate. The executors sold the estate, agreeably to the will, and distributed one moiety thereof among the relations of the wife. Suit was brought against the executors and distributees by the son, heir and executor of the brother, Richard, named in the will. President Pendleton, in delivering the opinion of the court, says: "It is contended by the appellant's counsel that Mrs. Shermer was by the will only tenant for life of a moiety, with a power to dispose of the fee, and that, not having executed that power, the estate descends to the heir of the testator. In support of this position several cases have been cited, but they seem to verify the saying of a judge, 'that, in disputes upon wills, cases seldom elucidate the subject, which, depending on the intention of the testator, to be collected from the will, and from the relation and situation of the parties, ought to be decided upon the state and circumstances of each case,' to which I will add that I have generally observed that adjudged cases have been more frequently produced to disappoint than to illustrate the intention, and I am free to own that, when a testator's intention is apparent to me, cases must be strong, uniform, and apply pointedly, before they will prevail to frustrate that intention." And the court held that the executors had properly distributed the funds, and so affirmed the decree. 2 Story, Eq. Jur. § 1393, says: "If there be an express limitation to a married woman for life, with a power to dispose of the same property by will, then her interest will be deemed to be a partial interest, and equivalent to a life estate only, and she cannot dispose of the property absolutely, except in the manner prescribed by the power;" and continues (section 1394): "On the other hand, if the property is expressly given to a married woman, 'to her for her sole and separate use,' without saying 'for life,' and she is further authorized to dispose of the same by will, in such a case the gift will be construed to confer on her the absolute property, and consequently she may dis-

pose of it otherwise than by will; for, the absolute property being given, the power becomes nugatory, and is construed to be nothing more than an anxious expression of the donor that she may have an uncontrolled power of disposing of the property." The deed to Mary E. Green was without saying "for life," and she was thereby authorized to dispose of the property by will, and also by deed, with the consent of the trustee, and joining with him and her husband in a conveyance of the same or any part thereof. In *Milhollen v. Rice*, 13 W. Va., 510, JUDGE GREEN, in delivering the opinion of the Court, says: "I conclude, therefore, as stated by Sir William Grant in *Bradley v. Westcott*, 13 Ves., 453, and by Chancellor Kent in *Jackson v. Robins*, 16 Johns., 588, 'that a devise or gift to A. and such persons as he shall appoint is a fee simple or absolute property in A., without appointment.' " Counsel for appellees very pertinently suggest that the fact that Charles S. Green, the judgment debtor, once owned the property, and then settled it on his wife, is liable to mislead one in the investigation of this question; "that, without his connection in this way with the making of the title to Mrs. Green, no one would for a moment contend that she did not take an equitable fee, or that a trust could in any event result to the grantor. This fact, however, does not affect the law of the case, or change the rules of construction. Let the court regard Charles S. Green, as he really is, in the light merely of an impersonal grantor, and all difficulties will melt away." If the grantor had been other than the husband of Mrs. Green, the estate conveyed would have been precisely the same, and the marital relations of the grantor to Mrs. Green represent the extent of his interest in the property after the conveyance, and at the occurrence of his death his interest ceased in the property, and the bill was properly dismissed. Counsel for appellees insist that the bill was demurrable on other grounds, upon which the bill should have been dismissed, which grounds of demurrer I deem it unnecessary to discuss.

Affirmed.

CHARLES TOWN.

HARMISON v. BALLOT COMMISSIONERS.

Submitted Sept. 26, 1898—Decided Sept. 26, 1898.

1. JURISDICTION OF COURTS—*Constitutional Law—Acts of the Legislature—Delegate Districts.*

An unconstitutional act forming a delegate district or apportioning delegates for the House of Delegates may be declared void by the courts, although the act is the exercise of political power, since in such case the question is judicial. (p. 180).

2. CONSTITUTIONAL LAW—*Delegate Districts—Census.*

When, after a census, the Legislature has, by law, created delegate districts, and apportioned delegates for the House of Delegates among the counties and districts, section 10 of article VI of the Constitution forbids any change until after the next census. An act making earlier change is void (p. 181.)

Error to Circuit Court, Jefferson County.

Application by Frank H. Harmison for a writ of *mandamus* directed to the ballot commissioners of Jefferson. Judgment for petitioner, and the commissioners ask for a writ of error.

Writ Denied.

JACOB ENGLE, for petitioners.

FOREST W. BROWN, for respondent.

BRANNON, PRESIDENT:.

In 1891, the Legislature made an apportionment of delegates among the various counties and districts to constitute the House of Delegates, giving Berkeley and Jefferson

Counties each one delegate, and erecting a delegate district, called the "Seventh delegate district," out of Berkely, Jefferson and Morgan Counties, with two delegates. In 1897 the legislature passed an act (chapter 78) taking Morgan County out of said district, and giving it one delegate, and giving Berkely and Jefferson each one delegate, and making them the Seventh delegate district, with one delegate. It reapportioned and redistricted the State as to delegates. A convention called by the Democratic party, claiming that the act of 1897 was unconstitutional, and that the Seventh district stood as it was under the act of 1891, composed of Berkely, Jefferson and Morgan Counties, nominated R. W. Morrow, a resident of Jefferson County, and Frank Harmison, a resident of Morgan County, as candidates for the House of Delegates, to represent said district; but the ballot commissioners of Jefferson County, acting under said act of 1897, refused to put said Harmison's name on the ballots to be used in the election to be held in November, 1898, and then Harmison asked and obtained, by the judgment of the circuit court of Jefferson County, a peremptory writ of *mandamus*, commanding said commissioners to put his name on such ballots; and said commissioners now ask this Court for a writ of error from said judgment.

A question occurred to my mind whether this Court could consider the case,—whether the matter was in its nature a judicial matter cognizable by the courts, or a matter of purely a political, legislative, or governmental nature, to be left absolutely to the Legislature, since the power to erect districts and apportion delegates was vested in it by the Constitution; but I find that the subject has been discussed in various cases, and it has been held that the constitutionality of apportionment acts is a subject of judicial inquiry, not merely political. This is based on the consideration that the judiciary must hold an act contrary to the constitution as no law for any purpose. *Denny v. State* (Ind. Sup.) 42 N. E. 929, and cases there cited. See, also, *State v. Wrightson* (N. J. Sup.) 28 Atl., 56. I find it so held in the six states of Indiana, Wisconsin, Michigan, New York, Illinois, and New Jersey. Further search shows that Massachusetts, Ohio, North Carolina, Nebras-

ka, and Kansas supreme courts hold the same doctrine, as will be seen in the opinions in *State v. Cunningham* (Wis.) 51 N. W. 724 (full discussion). Chapter 25, Acts 1893, gives the writ of *mandamus* to control ballot commissioners, as held in *Marcum v. Commissioners*, 42 W. Va., 263, (26 S. E. 281). Of course, this would not give jurisdiction if the matter were not of judicial character; but, being of such character, that act applies *mandamus*. Wherever the question of constitutionality arises in the administration of rights, the courts have power to pass on it. The case, then, turns upon the question of the constitutionality of the act of 1897. If that act is constitutional, Harmison is ineligible to represent the district, and has no right to go upon the ballots, because a resident of Morgan County, which, under that act, is no part of the district; whereas, if that act is unconstitutional, the district stands as under the act of 1891,—Morgan a part of it. Section 7 of article VI provides that “after every census the delegates shall be apportioned as follows,” giving a mode of apportionment. Then section 10 says: “The arrangement of the senatorial and delegate districts, and the apportionment of delegates, shall hereafter be declared by law as soon as possible after each succeeding census taken by authority of the United States. When so declared, they shall apply to the first general election for members of the Legislature to be thereafter held, and shall continue in force unchanged until such districts shall be altered and delegates apportioned under the succeeding census.” We plainly see that both sections contemplate one apportionment and arrangement of districts after each census, not a changing one every session of the legislature. This provision, fixing one apportionment after a certain event,—the taking of a census,—plainly contemplates that there shall be but one after each census. This provision is mandatory, not simply directory, for the reason that it manifestly designed to have a fixed apportionment, lasting from census to census, not varying and unstable. The nature of the subject tells us that this must be so, as it ought to be so. Another reason is that constitutional provisions are mandatory, not merely directory. Cooley, Const. Lim. 93. A case strongly supporting this position is the Indiana

case of *Denny v. State*, 42 N. E. 929. The constitution of Indiana provided that an enumeration of voters should be taken every six years, and that an apportionment of representatives should "be made at the session next following each period of making such enumeration;" and that case held that the mere fact that the constitution provided for an apportionment after each enumeration implied that, when such apportionment was once made, it forbade another until another enumeration, although there was no prohibition in the constitution against a change of apportionment, and that but one apportionment could be made in the six years. So, it was held in *Slauson v. City of Racine*, 13 Wis. 398, and Opinion of Justices, 6 Cush. 575, and *State v. Cunningham*, *supra*. But when we see that our Constitution expressly says that an apportionment, when once made, "shall continue in force unchanged until such districts shall be altered and delegates apportioned under the succeeding census," the case is made conclusive against any earlier change of district. The provision for one apportionment and districting after each census is mandatory, not by mere construction, but because there is a prohibition against any change until the next census. There is no room here to construe and doubt. We must simply obey the Constitution. If there were any escape, I would not declare the act void; but there is no other alternative. We therefore refuse a writ of error, as we regard the decision of the circuit court plainly right.

NOTE BY BRANNON, PRESIDENT:

I call attention to the case of *People v. Hutchinson*, 172 Ill., 486, 50 (N. E. 599) published since I delivered the above opinion. The constitution of Illinois provides that "the general assembly shall apportion the state every ten years" for senators, and so forth, and that case held said provision mandatory, and as prohibiting any second apportionment within the ten years after the legislature had once made an apportionment after a census. The case strongly supports the above opinion.

Writ Denied.

FALL SPECIAL TERM, 1898.

CHARLESTON.

BENT v. LIPSCOMB *et al.*

Submitted June 8, 1898—Decided November 16, 1898.

1. ATTORNEY AT LAW - *Attorney's Lien Assignment of Judgment.*

An attorney at law has a lien upon a judgment recovered by him for his client for his compensation, which lien is good against an assignee of the judgment, though he had no notice of the lien. (p. 184).

2. ASSIGNMENT OF JUDGMENT - *Attorney at Law.*

A writing given by a client to his attorney in a suit authorizing the attorney to retain out of the judgment, when recovered, a part for his compensation, is an assignment of such part (p. 184).

Error to Circuit Court, Randolph County.

Action by James A. Bent against Lipscomb & Lipscomb.

Judgment for defendants, and plaintiff brings error.

Reversed.

SAMUEL V. WOODS, for plaintiff in error.

P. LIPSCOMB, in proper person.

BRANNON, PRESIDENT:

Action by Bent against Lipscomb & Lipscomb before a justice, appealed to the circuit court, where, upon demurrer to evidence, judgment was given for defendants. One Kessell, in an action against Hinkle, recovered a judgment.

Bent was one of his attorneys. The common law gave him a lien on that judgment for his compensation as attorney, and he had a writing from Kessell giving him a right to "retain, out of any recovery of money had by a verdict and judgment, one-fourth value of such verdict and judgment in said suit in money, as compensation for his (said Bent's) services as one of my counsel in said case." Lipscomb & Lipscomb were associate counsel with Bent in the case, and took from Kessell an assignment of the judgment, and collected it. Bent brought this action against them to recover his fourth of the judgment. I think the record shows an assignment to the firm, not to one of them. At any rate, the firm collected the money. Counsel for Lipscomb & Lipscomb says that Bent had no lien. Why not? He had by common law and the writing. *Fowler v. Lewis' Adm'r*, 36 W. Va., 112, (14 S. E. 447). Notice of such lien is necessary as to debtor, but not to an assignee of the judgment. *Renick v. Ludington*, 16 W. Va., 378; 3 Am. & Eng. Enc. Law (2d Ed.) 472. This would show right to judgment under the head of *assumpsit* for money had and received by the defendants to the use of plaintiff,—money of his received by them. The evidence shows that defendants had notice of Bent's right, and took the assignment, as one of them declared, with set purpose to keep the money from going to Bent's hands, which shows they had notice of his right, if that were material, as also does other evidence show it, and makes the case all the stronger against them. They said they took the assignment to keep the money from going to Bent's hands, as they had fees. So had Bent. They were justified in taking the assignment; but law and justice to Bent make them take the assignment subject to his rights. They afterwards paid half the judgment to Kessell. This seems to show that they took the assignment to defeat Bent. His lien forbade this payment to Kessell. Moreover, that paper from Kessell to Bent was an assignment. It would not destroy, but confirm, his common law lien. *Bentley v. Insurance Co.*, 40 W. Va., 730, (23 S. E. 584); 2 Am. & Eng. Enc. Law, 1055. Defendants had full notice of Bent's right before payment to Kessell, and were warned not to pay him. They could not pay him Bent's money.

As an assignment, it is good against them; and, even if there were no lien, this assignment would sustain the case.

Counsel argues that the court had no jurisdiction, as Kessell was not, but should have been, a party to this suit, and that the Constitution says that he cannot be deprived of property without due process of law. Now, it is not with defendants to defend Kessell's rights. The question in this case was, did defendants collect and refuse to pay money belonging to Bent? Between these parties, that was the sole question,—*assumpsit*, for money had and received. If defendants wished to vindicate Kessell's right, why did they not hold the money, and, when sued, claim to be stakeholders, and bring in Kessell by interpleader, and at once protect Kessell and themselves, and thus have justice done between all parties? Or, even after payment to Kessell, why not show by proof that for some reason, not even hinted at by the record, Bent had no claim to this money, instead of merely demurring to Bent's evidence, which clearly shows his lien? Kessell could not be a party to this suit. The case is plainly with the plaintiff, and we reverse the judgment, and enter judgment for him.

Reversed.

CHARLESTON.

JONES *et al.* v. THORN *et al.*

Submitted June 6, 1898—Decided November 16, 1898.

1. IMPLIED TRUST—*Husband and Wife—Equity.*

Where a tract of land is owned by a husband and wife, the same being part of a larger tract, she owning as her separate estate four-ninths and he two-ninths, and she joins with him in the execution of a deed of trust on the entire six-ninths to secure the payment of a debt owed by the husband, and dies before the debt falls due, leaving children, and when the trustee proceeds to sell the entire six-ninths, conveyed to him, if collusion is shown between him and the trustee, and it appears the sale is made only for the purpose of conferring title on him, equity will consider and treat him as a trustee for the children who inherited said four-ninths, subject to the trust as to said four-ninths. (p. 193).

2. IMPLIED TRUST—*Husband's Debt—Husband and Wife—Security.*

Where the debt secured by such trust was the debt of the husband, and the wife's property was only included in the trust deed as an additional security, equity would require that the husband's portion of the property should be exhausted before selling the wife's property. (p. 190).

Appeal from Circuit Court, Marion County.

Bill by Bessie L. Jones and another against Benjamin Thorn and others. From a decree dismissing the bill, plaintiffs appeal.

Reversed.

JOHN W. MASON, and JAMES A. HAGGERTY, for appellants.

W. S. MEREDITH, for appellees.

ENGLISH, JUDGE:

On the 30th day of August, 1877, Nimrod Toothman sold four undivided ninths of a tract of land situated in Marion County, containing sixty acres, to Mary A. Jones, wife of H. Frank Jones, in consideration of eight hundred and fifty dollars, subject to the dower of Phœbe J. Swisher, widow of John W. Swisher; and on the 16th of December, 1879, James N. Swisher and Sarah C. Swisher, his wife, Nimrod Toothman and Sisson M. Toothman, his wife, and Phœbe Jane Davis, late widow of John W. Swisher, conveyed two undivided ninths of said sixty acre tract to said H. Frank Jones, said Jones also purchasing from said Phœbe Jane Davis her dower interest in said four undivided ninths of said land conveyed as aforesaid to Mary A. Jones. On December 29, 1880, said Jones was indebted to one John Core in the sum of five hundred and fifty dollars, payable October 1, 1880, and on December 29, 1880, said Jones and Mary Jones, his wife, executed a deed of trust on the four-ninths of said tract conveyed as above stated to Mary Jones, and the two-ninths of same conveyed by said H. Frank Jones to A. S. Hayden, trustee, to secure the payment of said sum of five hundred and fifty dollars to said John Core, and in this way the four-ninths of said tracts which had been conveyed to said Mary A. Jones became pledged for the debt which her husband owed to John Core. On the 4th of July, 1881, said Mary A. Jones died, leaving four infant children, to wit, Bessie L. Jones, Andie L. Jones, Edith E. Brand, and Reno Jones. Said debt to John Core became due October 1, 1881, and default was made in the payment thereof. On November 19, 1881, A. S. Hayden, trustee, sold the four-ninths of said tract conveyed to said Mary A. Jones, together with the two-ninths which had been conveyed to said Frank Jones under the deed of trust, and said H. Frank Jones became the purchaser at six hundred dollars, which sum was sufficient to pay said Core debt; and thereupon said trustee deeded the entire property described in the trust deed to H. Frank Jones, who afterwards acquired some additional interests in said sixty acre tract, and contracted a considerable indebtedness, and, to secure the payment of the

same, conveyed his interest in said land, including the four-ninths conveyed to Mary A. Jones, and purchased by him at said trust sale, to A. S. Hayden, trustee. On August 29, 1889, said Hayden, attempted to sell the same under said trust deed, but was restrained by injunction in the circuit court of Marion County. In the injunction cause a decree was rendered directing a sale of said land, and Hayden, acting as special commissioner under this decree, sold the land to Jesse G. Floyd and Hiram Kent on March 7, 1893, who, in December, 1893, sold and conveyed it to Benjamin Thorn and wife. On the 18th of September, 1894, a suit in equity was instituted by Bessie L. Jones and Andie L. Jones in the circuit court of Marion County, said plaintiffs being children and heirs at law of Mary A. Jones, against said Benjamin Thorn, Alice S. Thorn, Edith E. Brand, Reno Jones, and others, to set aside said last three named conveyances, claiming that four-ninths of said sixty acres belonged to them and said Edith E. Brand and Reno Jones, as heirs at law of Mary A. Jones; praying a partition of said tract giving to the four children of Mary A. Jones the four-ninths thereof. The note from H. Frank Jones to John Core for five hundred and fifty dollars, to secure the payment of which the deed of trust of December 29, 1880, was executed, bears even date with said trust deed, while the conveyance of the four-ninths, of said sixty acres from Nimrod Toothman to Mary A. Jones bears date August 30, 1877. It does not appear that said H. Frank Jones owed any debts at the time said conveyance was made to his wife, and the heirs of said Mary A. Jones do not appear to have been made parties to any of the suits against said Jones. Answers were filed by Jesse G. Floyd, Hiram Kent, Benjamin Thorn, in his own right and as committee of Alice S. Thorn, which were replied to generally; depositions were taken; the cause submitted; and upon the hearing the court dismissed the bill, and the plaintiffs obtained this appeal, claiming that said decree was erroneous—First, because, said Mary A. Jones, who owned two-thirds of the land conveyed by the deed of trust of November 29, 1880, to secure the Core debt, having died before the debt became due, it was error for the trustee, under the circumstances, to execute the trust. A part of

the land belonged to the principal debtor, a part to the surety,—that belonging to the principal being worth enough to pay the debt; and, the surety being dead, leaving infant children, no sale should have been made without the intervention of a court of equity.

Now, the fact that four-ninths of the sixty acre tract of land was the separate property of Mary A. Jones must be conceded when we consider that the record discloses that said four-ninths were conveyed to said Mary A. Jones by Nimrod Toothman on August 30, 1877, and at that time our statute provided that any married woman might take by inheritance, or by gift, grant, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner, and with like effect, as if she were unmarried, and they should not be subject to the disposal of her husband, nor be liable for his debts. By joining with her husband, Mary A. Jones gave a deed of trust upon said four-ninths to secure the debt of five hundred and fifty dollars to Core, which her husband owed; and in the same deed he executed a trust upon the two-ninths owned by him to secure the same debt. After the death of said Mary A. Jones, said H. Frank Jones suffered the entire six-ninths of said property to be sold, and became the purchaser himself for the amount of the Core debt. In his deposition said Jones states that he went to the trustee, Hayden, with the money to pay the Core debt, but the trustee advised him to allow the property to be sold under the trust; his wife being dead, he could purchase at the sale, and in that way, it would become his land,—that is, the entire six-ninths. The legal title was then in the trustee, Hayden, and the equity of redemption as to the four-ninths belonging to Mary Jones at the time of her decease was in her four children, and the equity of redemption of said two-ninths was in said H. Frank Jones. In the circumstances equity would consider that in purchasing said property for the amount of his debt to Core he merely redeemed the same, relieving the entire six-ninths from said trust lien. It would also appear to be in accordance with

the principles of equity that, the property of said Mary Jones having been included in said deed of trust as security for the debt of her husband, the property of the principal should have been exhausted first before coming onto her four-ninths for satisfaction.

As to the suggestion in the above assignment of error that, Mary A. Jones, one of the grantors in said deed of trust being dead, leaving infant children, no sale should have been made without the intervention of a court of equity, this Court has passed upon this question in the case of *Spencer v. Lee*, 19 W. Va., 179 (Syl. point 6), where it is held that "a court of equity will in no case set aside a sale made by a trustee simply because it was made after the death of the grantor." See, also, *Burke v. Adair*, 23 W. Va., 159. After becoming the owner of other portions of said sixty acres, said H. Frank Jones executed another deed of trust upon said six-ninth of said sixty acres, and the other portions he had acquired, to the same trustee, to secure certain indebtedness therein specified. Subsequently, a chancery suit was brought by said H. Frank Jones against said Hayden, trustee, and others, in which such proceedings were had that said Hayden, as trustee, was directed by a decree therein rendered to make sale of said land mentioned in said trust deed; in pursuance of which said land was sold by Hayden, trustee, at which sale Jesse G. Floyd and Hiram Kent became the purchasers of the land described in said last-named deed of trust, including the four-ninths which was the separate estate of Mary Jones, deceased, and which was conveyed by said Hayden, trustee, to said Floyd and Kent, and by them conveyed to Benjamin Thorn. It is contended by the appellants that the deed executed by A. S. Hayden, trustee, to H. Frank Jones, was void as to the four-ninths of said land belonging to the estate of Mary A. Jones; and while there is no allegation of fraud on the part of said Hayden, or of collusion between him and said H. Frank Jones, yet it appears from the deposition of said Jones that he went to said trustee to pay the debt secured by the trust, and the trustee advised him to allow the land to go to sale, and become the purchaser of it for himself; which he afterwards did. Now, the very serious question here pre-

sented for our consideration is, could Jones, by paying his own debt, not a cent of which the estate of his wife was bound for, otherwise than as his security, acquire title to the four ninths of said land, which was the separate estate of his wife at the time said trust was executed? What consideration did she or her heirs receive from said Jones, directly or indirectly, for said four-ninths? Surely, the payment of his own debt was no consideration, and did not entitle him to a deed for it. As Hayden was Jones' agent, and his creditor John Core, in paying the money to Hayden, he only paid it to Core; but did that payment entitle him to a deed to his wife's land? Her contract in conveying her land to said trustee was that if her husband, H. F. Jones, did not pay said note, with interest, to Core, her land might be sold with his to raise the money; but her husband, as is alleged in the bill, and as shown on the face of the deed from Hayden, purchased the land for six-hundred dollars,—enough to pay the Core debt, interest, and cost of sale. It is true that the answer claims that Jones, on the day of the purchase executed a deed of trust on said six-ninths of said tract to secure one Eli C. Morris the payment of money borrowed of him for the purpose of paying said Core debt; but no such copy of said trust is exhibited, and Jones, in his deposition, says he borrowed the money from the First National Bank of Fairmont to pay the Core trust, and repaid the bank from money received by him from his father. Now, if H. F. Jones acquired no title to the four-ninths of said tract conveyed to the trustee by his wife, it is certain he could convey no title thereto in the second deed of trust to Hayden, trustee, nor can we see that said Hayden's right to sell the same was increased by the decree directing him to do so as trustee. As to the purchasers at the sale made under said decree, *caveat emptor* applied. My first impression was that said H. Frank Jones was entitled to a life estate in said four-ninths of said sixty acre tract as a tenant by curtesy, but attention has been called to the fact that said four-ninths of said tract was conveyed to Mary A. Jones by Nimrod Toothman and wife, subject to the dower right of Phœbe J. Swisher, and that said Mary A. Jones died before said Phœbe J. Swisher; and, although said Phœbe

is now dead, the said Mary A. Jones was never seised in fact of said four-ninths of said sixty acres, and therefore her husband, H. Frank Jones, was never entitled to a life estate therein as tenant by the curtesy, and therefore the case does not fall within the purview of the case of *Merritt v. Hughes*, 36 W. Va., 356, (15 S. E. 56), where it is held that "a remainder-man or reversioner cannot compel partition during the continuance of the particular estate." I am therefore led to the conclusion that the heirs at law of said Mary A. Jones are entitled to the partition prayed for.

In the absence of any allegations of fraud or collusion between said H. F. Jones and Trustee Hayden, can we, in response to the prayer of the bill, declare the deed from said trustee to said Jones void? We must presume that the land was properly advertised and regularly sold. The deed appears to be formal and regular on its face; and while, in the circumstances, it may not have conveyed to said Jones the title of the heirs at law of Mary A. Jones to said four-ninths would not equity treat it as a release of the trust lien on said four-ninths, and not consider the deed absolutely void? I cannot believe that the title of these remainder-men was extinguished by the sale of this property under said trust deed by Hayden, trustee, and by H. F. Jones bidding it in, and obtaining a deed by paying his own debt and the costs of sale, or that H. F. Jones, by reason of that transaction, acquired title to the four-ninths of said sixty acre tract, which was the separate estate of his wife, subject only to the dower right of Phœbe J. Swisher. Now, as to the effect of the sale under the second trust deed to Hayden, trustee, who was the same trustee that sold the property under the first trust, said Hayden had notice of all the facts connected with the former transaction, and, in addition, Jones could only convey to him such title as was vested in him; and in selling under the trust said trustee would convey with special warranty, and to Floyd and Kent, the purchasers under said second trust deed, the principle of *caveat emptor*, applies. So, in the case of *Fleming v. Holt*, 12 W. Va., 162, GREEN, JUDGE, in delivering the opinion of the Court uses the following language: "In considering this question, we must

bear in mind that a purchaser at a public sale of land made by a trustee must look to the title of the grantor of the land, and is entitled only to a deed with special warranty of title. He cannot look to the trustee for a good title, for in making the sale he is but an agent. He cannot look to the creditor, for he sells nothing, and is merely to receive the proceeds of the sale. To such a sale the principle *caveat emptor*, applies."—citing *Petermans v. Laws*, 6 Leigh, 529; *Saunders v. Pate* 4 Rand, (Va.), 8; *Sutton v. Sutton*, 7 Grat., 237; *Findlay v. Toncray*, 2 Rob. (Va.) 374; Rawle, Cov. 418, *Goddin v. Vaughan's Ex'x*, 14 Grat., 117. When, therefore, Floyd and Kent became the purchasers under said trust sale, they only purchased such title as was vested in Jones. By looking to the records, they could have seen that Jones obtained a conveyance of the property left by his deceased wife to her children by paying his own debt, for which that property had been pledged, with a sufficient amount of his own to pay the debt, to secure the payment of his own debt; and that, while he obtained a deed from the trustee for the four-ninths of the property left by his wife, he paid no consideration for it, and, the equity of redemption to said four-ninths of the sixty acre tract having descended to the children of said Mary Jones, H. Frank Jones, having obtained a deed therefor from said trustee without paying any consideration, must be held and considered as a trustee holding the title to said four-ninths for the plaintiffs and the defendants Edith E. Brand and Reno Jones. See *Webb v. Bailey*, 41 W. Va., 463, (23 S. E. 644), in which the doctrine of implied trusts is discussed, and in which the facts are somewhat similar to those in the case under consideration.

In this case the land of the heirs of Mary Jones was included in the sale with a view to conferring title upon H. F. Jones, when it appears that the two-ninths owned by him was sufficient to pay the trust debt, and by inducing the trustee to sell the entire six-ninths he obtained an ostensible title to said four-ninths, without paying any consideration therefor, for the reason that the two-ninths owned by him were worth more than the trust debt. My conclusion, therefore, is that the circuit court erred in dismissing the plaintiffs' bill, and, as the evidence in the

cause discloses that there was collusion between said trustee, Hayden, and said H. F. Jones, and that Hayden, trustee, instead of receiving the amount of the debt secured by said first trust deed from H. F. Jones, advised said Jones to allow the property to be sold, and at the sale purchase the entire six-ninths of said tract, the decree complained of is reversed, and the cause remanded, with directions to the circuit court of Marion County to take such steps as will convey the legal title of the four-ninths of said sixty-acre tract to the heirs at law of Mary A. Jones, deceased, and award to them the partition prayed for, with costs to the appellants.

Reversed.

45	194
64	116
45	194
61	607
45	194
66	218

CHARLESTON.

KNIGHT *et al.* v. TOWN OF WEST UNION *et al.*

Submitted June 11, 1898—Decided November 16, 1898.

1. MUNICIPAL CORPORATIONS—*Ordinance—Repeal.*

A subsequent municipal ordinance, fully covering the subject-matter of a previous ordinance, being a substitute therefor, repeals the former by implication, without words to that effect. (p. 196).

2. MUNICIPAL CORPORATIONS—*Bonds—Conduct of Election.*

In a municipality having less than six hundred voters, an election confined solely to the question of the issue of municipal bonds is not invalid because conducted in the mode prescribed for the election of municipal officers in the absence of political or party nominations. (p. 196).

3. ELECTIONS—*Officers—Informalities in Election.*

Mere informalities of the election officers in holding, and ascertaining and declaring the result of an election, unless otherwise provided by statute, will not vitiate an election otherwise fair and impartial. (p. 197).

4. MUNICIPAL CORPORATIONS—*Bonds—Ordinance.*

In an ordinance the authorization of bonds not to exceed six thousand dollars is equivalent, in legal effect, to fixing the amount of such bonds at such sum. In either case, the authorities would only have the right to issue bonds sufficient to cover the purpose for which the ordinance is adopted. (p. 197).

5. MUNICIPAL OFFICERS—*Officers de Facto—Officers de Jure—Acts of Officers.*

The acts of *de facto* municipal officers, within the scope of their authority and under color of law, are valid and binding, in the absence of clear proof that they are not the *de jure* officers of such municipality. (p. 197).

6. MUNICIPAL CORPORATIONS—*Taxation—Limit of Taxation.*

Section 31, chapter 47, Code, authorizes towns and villages chartered under such chapter to levy taxes, not exceeding one dollar on every hundred dollars of property within such municipality. (p. 198).

Appeal from Circuit Court, Doddridge County.

Suit by T. K. Knight and others against the town of West Union and others. Decree for defendants, and plaintiffs appeal.

Affirmed.

W. S. STUART, for appellants.

WILLIS & STUCK and J. V. BLAIR, for appellees.

DENT, JUDGE:

Injunction against the issue of waterworks bonds by the municipal authorities, which was dissolved on final hearing by the Circuit Court of Doddridge County. Plaintiffs appeal, and rely upon numerous alleged errors, as follows, to-wit:

1. As the first assignment of error is merely general and is admitted to be covered by the other assignments, it becomes unnecessary to discuss in specifically.

2. The second assignment is, in effect, that, at the time of the passage of the ordinance in controversy, there was

already in existence an unrepealed ordinance, relating to the same subject-matter, appearing in the minutes of the council. The adoption of a subsequent ordinance, covering fully and completely the subject-matter of a former ordinance, operates by implication to repeal the same. 23 Am. & Enc. Law, 485.

3. The third, fourth, and fifth assignments relate to the mode of holding the election. The appellants insist that it should have been held under the present, or what is known as the "Australian," ballot system; whereas, it was held in the mode and according to the laws in force prior to the adoption of such system in this State. It is conceded by appellants' counsel that the election was held as provided in section 85, chapter 29, Acts 1895, for the election of municipal officers, in absence of party nominations in municipalities containing less than six hundred voters, and that the town of West Union was a municipality coming within the purview of such law. Section 4, chapter 141, Acts 1872-73, provides: "Such elections shall be conducted in all things according to the laws then in force governing elections and the provisions of the charter of the city, town or village in which they are held." This means in so far, of course, as such provisions are applicable, and is to the effect that such election, when held in a municipality, shall be conducted in all things as elections for municipal officers are conducted; and hence, as it is in no wise a party question, and in a municipality containing less than six hundred voters, it should be conducted as elections for municipal officers are conducted when there are no party nominations. The words, "in which an election is held for municipal officers," are used in opposition to elections held for national, state and county officers, and were not intended to exclude elections held for other municipal purposes. In a simple bond election of this character, it is not reasonable to hold that the Legislature intended it should be held under the intricate and nonapplicable provisions of the Australian ballot system. Nor was there any good reason why the council should postpone the ascertainment of the result until after the fifth day of the election, as no irregularities on its part, as to ascertaining, declaring, and recording the re-

sult, could possibly invalidate the same. Its duties in this respect are merely ministerial, and are subject to correction in the manner provided by law.

4. In the fifth assignment it is insisted that the ordinance is invalid, for the reason that the amount of bonds to be authorized, instead of being fixed at six thousand dollars is fixed at a sum not to exceed six thousand dollars. One expression is equivalent to the other, and in either case it would be necessarily construed to mean that the council was authorized to issue bonds, to the amount of six thousand dollars, if necessary, for the purpose expressed in the ordinance; otherwise not. It is time enough for the council to make provision for the investment of the sinking fund when it accrues.

5. The sixth assignment of error is unsustained, because it clearly appears that the authorities had given sufficient notice, and were proceeding to sell said bonds at public sale, to the highest bidder in writing. The notice was to the public, and was sufficiently explicit to be in compliance with the statute.

6. The seventh assignment of error relates to the conduct of election officers. It is the settled law of this State that misconduct of election officers, which does not affect the result of the election, cannot invalidate such election. *Dial v. Hollandsworth*, 39 W. Va., 1, (19 S. E. 557).

7. The eighth assignment attacks the official integrity of the mayor and council of the town. They are admitted to be *de facto* officers, with the title to their offices unimpeached, except in this collateral proceeding, and, unless the contrary plainly appears, they will be presumed to be *de jure* officers, and all their official acts be respected and upheld. Mere vague charges as to their failure to qualify will not render their official acts void.

8. The ninth assignment relates to the title of the ordinance, "An ordinance for the issue of waterworks," which the appellants insist is insufficient to give notice of the subject-matter thereof. This is clearly shown to have been a mere clerical omission in the recordation of the ordinance. It is, however, selfcorrective, as it easily suggests the words necessary to make complete sense. No person was misled thereby, as it appears from the

bill to have been properly corrected in the published copy thereof.

9. The tenth assignment is: "Because the regular annual levy of the said town for running the same was already 60 cents on the hundred dollars, and the said 25 cents additional direct annual levy is unlawful, and exceeds the limit fixed by said section 1 of chapter 141 of said Acts of 1872-73." A sufficient answer to this is that section 31, chapter 47, Code,—being the chapter under which the town of West Union exists,—authorizes a levy of not exceeding one dollar on every hundred dollars of property, and which, at least, must be regarded as amendatory of section 1, chapter 141, Acts 1872-73, being a subsequent enactment.

10. The eleventh assignment of error, relating to the term of court at which the injunction was dissolved and bill dismissed, has been cured by the production of the necessary orders showing the appointing and holding of a special term of court in accordance with law; at which this cause was heard and determined.

A careful scrutiny of the record reveals no good reason why the legally expressed will of the voters of the town of West Union should not be carried out by the authorities thereof, within the limitation of the Constitution and laws of this State, and therefore the decree complained of is affirmed.

Affirmed.

CHARLESTON.

WILLIAMS v. BOARD OF EDUCATION OF FAIRFAX DISTRICT.

Submitted June 11, 1898—Decided November 16, 1898.

1. PUBLIC SCHOOLS—*Board of Education—Discrimination.*

The law of this State does not authorize boards of education to discriminate between white and colored schools in the same district as to length of term to be taught. (p. 201).

2. PUBLIC SCHOOLS—*Board of Education—Compensation of Teacher—Discrimination.*

Where a teacher has been employed to teach a colored school by the trustees thereof, under the supervision of the board of education, and she teaches the same the full term of the other primary schools in the same district, satisfactorily to the patrons of such school, she is entitled to pay for her whole term of service; and the board of education cannot escape the payment thereof by interposing a plea that it had, by reason of the school being a colored school, limited the term thereof to a shorter period than the white schools in the same district. Such discrimination, being made merely on account of color, cannot be recognized or tolerated, as it is contrary to public policy and the law of the land. (p. 202).

Error to Circuit Court, Tucker County.

Action by Carrie Williams against the board of education of Fairfax district, in the County of Tucker. Judgment for plaintiff, and defendant brings error.

Affirmed.

C. O. STRIEBY, for plaintiff in error.

J. R. CLIFFORD and A. G. DAYTON, for defendant in error.

DENT, JUDGE:

Carrie Williams sues the board of education of Fairfax

District, in the County of Tucker, for three months' unpaid services as teacher of the colored school of Coketon, in said district, amounting to one hundred and twenty dollars, and also one dollar deducted illegally off of a previous month's salary for failure to return the term report required by law. The circuit court gave her judgment, and the board brings the matter to this Court, and now here interposes the following defenses:

1. That the individual names of the members of the board are set out in the summons and declaration. This was wholly unnecessary, and will be regarded as mere surplusage.

2. That her appointment as a teacher was not in writing, as required by section 13, chapter 45, Code. After the service has been rendered in a satisfactory manner to the patrons of the school, and the board has recognized and approved it, by receiving her monthly reports, and paying her five months' salary, it is too late for them to object that her appointment was not in writing, as required by law.

3. That the trustees had not established a primary school as required by section 17, chapter 45, Code, the enumeration of colored children being twenty-six, but had apportioned the funds under section eighteen, *Id.*, assigning to the colored children their *pro rata* share. This is directly in the face of the positive mandatory requirement of the statute, and it is contrary to public policy to entertain such a plea. No public officer should be permitted to plead his own misconduct in defense of what would otherwise be a just legal claim against him. On the contrary, the court will presume that he faithfully discharged the duties of his office, in the very face of his plea, when such presumption appears proper. In this case the trustees established a colored school at Coketon; and it must be presumed that this was done in accordance with the provisions of section 17, and not section 18, chapter 45, Code. To hold otherwise would be to condemn the trustees as guilty of a plain failure of duty, subjecting them to the penalties imposed by section 59 of said chapter, which would be unjust to them in the face of the matters contained in the record. The trustees are not par-

ties in any wise to this suit, and it is hardly fair to them for the board to seek to defend itself by alleging neglect of plain mandatory duty on their part, if legally proper to do so, which is certainly not the law.

4. That, the people of the district having voted for an eight months' school, the board arbitrarily determined the white schools should run eight months, and the colored school only five months. This distinction on the part of the board, being clearly illegal, and a discrimination made merely on account of color, should be treated as a nullity, as being contrary to public policy and good morals. At the end of five months the board notified the teacher to stop the school, the only reason for so doing being their discriminating action towards the colored school. This she refused to do, but taught it, satisfactorily to the patrons of the school, the full eight months authorized by law. In the case of *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va., 617, it is said: "The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public." On page 3 of *Greenhood on Public Policy* it is said: "The element of public policy in the law of contracts and in the law generally is by no means of recent origin, but owes its existence to the very sources from which our common law is supplied." "It secures the people against the corruption of justice or the public service, and places itself as a barrier before all devices to disregard public convenience." And on page 3: "By 'public policy' is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or the public good." Hence no court will permit an otherwise just claim to be defended on the grounds of dereliction of duty or misconduct on the part of any public officer, because detrimental to the public service, and injurious to the common weal. As no individual can take advantage of his own wrong, so no public servant can take advantage of his own illegal conduct, or failure to discharge his official duties in accordance with the express provisions of the statute that creates him. Ignorance of law is no excuse, and violation

of law is no defense. Discrimination against the colored people, because of color alone, as to privileges, immunities, and equal legal protection, is contrary to public policy and the law of the land. If any discrimination as to education should be made, it should be favorable to, and not against, the colored people. Held in the bondage of slavery, and continued in a low moral and intellectual condition, for a long period of years, and then clothed at once, without preparation, with full citizenship, in this great republic, and the power to control and guide its destinies, the future welfare, prosperity and peace of our people demand that this benighted race should be elevated by education, both morally and intellectually, that they may become exemplary citizens; otherwise the perpetuity of our free institutions may be greatly endangered.

The board claim, however, that the proper remedy was by *mandamus*, and that the plaintiff had no right to take the law into her own hands. How much better was it for the patrons of the school, the board, and the public, that she should regard her employment as strictly in accordance with law, and disregard the illegal discrimination on account of color, and thus secure to her pupils their legal rights, without resort to the writ of *mandamus*, which, while it might have condemned and punished the board, would have been inadequate to furnish the relief sought. There is no question that she was employed to teach the school, and that she did teach it in accordance with law, and satisfactorily to its patrons. But the board says, it being a colored school, it was allowed its *pro rata* share of the funds, and limited to the period of five months. This action on its part, being without authority, and in direct disobedience of law, must be disregarded, and the board presumed to have discharged its legal duties.

Counsel insist that the colored pupils, having been allotted their *pro rata* share of the school funds, have no right to complain. The law guarantied them eight months of school, and, though it cost many times in proportion what the white schools cost, they should have had it. Money values should not be set off against moral and intellectual improvement. A nation that depends on its wealth is a depraved nation, while moral purity and intellectual pro-

gress alone can preserve the integrity of free institutions, and the love of true liberty, under the protection of equal laws, in the hearts of the people. The judgment is affirmed.

Affirmed.

CHARLESTON.

WOODS, SPECIAL COMMISSIONER, *v.* CAMPBELL *et al.*

Submitted June 9, 1898—Decided Nov. 17, 1898.

45	208
47	91
45	208
48	36
48	208
45	208
57	35

1. EQUITY—*Laches*—*Commissioner in Chancery.*

By a decree confirming a sale of land, two commissioners are appointed to collect and disburse the purchase money on the claims thereto, fixed and determined by a former decree. One of the commissioners permits the other, who is the attorney for the claimants, to collect and disburse the purchase money, while he remains passive. Ten years after the death of the active commissioner, twenty-seven years after the date of their appointment, and thirty-one years after the decree fixing the claims and liabilities, the inactive commissioner files a bill to ascertain whether any of the purchase money remains unpaid, and, if so, to resell the land, but fails to allege or show that any of the purchase money remains unpaid, or that any of the claims against the same remain unsatisfied. Such bill is demurrable for want of equity. (p. 206).

2. REVIEW ON APPEAL.

Issues not determined by the circuit court will not be considered by this Court on appeal. (p. 207).

Appeal from Circuit Court, Barbour County.

Bill by Samuel Woods, special commissioner, against George G. Campbell and others. Decree for plaintiff, and defendants appeal.

Reversed.

SAMUEL V. WOODS, for appellants.

DAYTON & DAYTON, FRED O. BLUE, and SHELTON L. REGER, for appellee.

DENT, JUDGE:

On the 18th day of February, 1893, Samuel Woods, special commissioner, filed his bill of complaint in the Circuit Court of Barbour County against George G. Campbell and others, which, among other things, contained the following allegations pertinent to this appeal, to-wit: That on the 3d day of January, 1861, plaintiff and co-commissioner, David Goff, under a decree of said circuit court, sold a certain tract of land, known as the "Gilbert Boyles Farm," to George Campbell, now deceased, and who, together with George G. Campbell, his son (defendant), as his surety, executed his three obligations of eight hundred and fifty three and one-third dollars each, payable in one, two and three years thereafter, with interest, which said notes remain filed in the papers of the cause, never having been drawn therefrom. Owing to the pendency of the war, said sale was not confirmed until the March term, 1866, when, by a final decree, the said commissioners who had executed a bond for the purpose were directed to collect the purchase money, and, after payment of costs, to disburse the same on the debts decreed, including a debt to George Campbell of eight hundred and forty-three dollars and thirty-four cents, with interest on five hundred and thirty dollars and eighty-six cents from the 9th day of July, 1860, which would necessarily be a credit on his purchase money note; and, on the payment of such purchase money, Samuel Woods, commissioner, was directed to make a deed to the purchaser. That about the year 1866 George Campbell died, leaving as his only heir George G. Campbell, who by his deed conveyed the land in controversy to his son, Bedford Campbell. That as plaintiff had been the attorney for Campbells, and David Goff was the attorney for those en-

titled to the proceeds of the sale, and who had been decreed to be paid out of the same, he left the collection of such purchase money to the said Goff. That he knows the said Goff was paid eight hundred dollars on the ——day of September, 1865, and two hundred and twenty-five dollars on the 7th day of December, 1865, on said purchase money; but whether any other sums were paid said Goff, he is not informed. That said David Goff died about the year 1883. That plaintiff received on the first note one hundred and thirty-eight dollars and thirty-five cents, 13th October, 1865, and one hundred dollars, 9th March, 1866, and this was all he received on such purchase money. Plaintiff further alleges that having no certain knowledge that the purchase money due was fully paid David Goff, either as commissioner, or as attorney for A. G. Welch and others, he declined to surrender said obligations, or to convey to said George Campbell or to said George G. Campbell the legal title to said Boyles farm, and he still retains said legal title, and the vendor's lien on said farm, as incident to said legal title, to secure whatever amount of purchase money may not have been in fact paid. And he prays that the defendants may be compelled to answer the allegations of the bill under oath; that the amount remaining unpaid upon said bonds may be ascertained, and declared a vendor's lien on said Boyles farm; and that, unless the same be paid in a reasonable time, the said farm may be sold, and the proceeds applied to the satisfaction of the amount remaining unpaid upon said obligations, etc. The defendants George G. Campbell and Bedford Campbell demurred to this bill on the ground of laches, presumption of payment, and the statute of limitations; and on this demurrer the whole case depends.

The purchase money notes were long since barred by the statute of limitations, and, about twenty-seven years having elapsed since the final decree and the last payment on the debt that is shown to have been made, the presumption of payment undoubtedly arises, unless there is something to relieve this case from the effect of such presumption. The laches in prosecuting this matter is certainly gross, and the only excuse given therefor was that his commissioner, David Goff, was the proper party to re-

ceive and disburse the money; and the bill admits that he did so in part, but is not prepared to say as to the residue, having no accurate knowledge on the subject. But the bill, for other reasons, fails to make out a case justifying the aid of a court of equity. It not only fails to allege, except by mere doubtful inference, that any of the purchase money remains unpaid, but even intimates that it has been paid to the plaintiff's co-commissioner; nor does it allege that any of the parties who were entitled to receive such purchase money, after George Campbell's debt was deducted, have not been fully paid and satisfied, although as to them the presumption of payment from lapse of time and laches, unrebutted, is complete, and there is nothing in the face of the bill to show that they are setting up any claim of nonpayment. Without any allegation of the non-receipt of the necessary amount and the nonpayment of these claims by his co-commissioner, David Goff, and in the face of the presumption raised by the lapse of time and laches, plaintiff seeks to throw upon the defendant, George G. Campbell, the surety in the notes, and heir at law of George Campbell, the burden of proving the full payment thereof, although the bill fails to show any one complaining in regard thereto, except the plaintiff, who is without personal interest, is a mere trustee, and presents no just grounds for the maintenance of his bill. The pretext is that he wants to be relieved in the premises. Relieved of what? He fails to show any liability against himself. It is true, he was to make a conveyance to the purchaser, on full payment of the purchase money. The purchaser is long since dead, and no one is seeking to compel him to make a deed, or to prosecute the claim for unpaid purchase money, or to pay any of the claims decreed over thirty-one years prior to the commencement of his suit. The bill, for want of sufficient equitable allegations, is demurrable.

Two other bills were pretentiously heard together with the plaintiff's bill. No decree, however, is made, granting or refusing the relief sought by them, but all the relief granted is apparently on Wood's bill alone. The original bill of Albert G. Welch and others against George G. Campbell and others was finally ended and deter-

mined by a decree entered of record in March, 1866. In January, 1887, Eberle G. Welch and others filed what they styled a "bill of review and supplemental bill," in which the only relief prayed is that a certain deed made by Samuel Woods, commissioner, be set aside and rendered null and void. Answers were filed to this bill, setting up matters in bar thereof and demurrer thereto; but such matters remain wholly undetermined, as the final decree does not notice them, other than to refuse a demand for security for costs, and to require other parties, whose names are mentioned, to be made parties thereto. Why the circuit court has not disposed of the questions raised by this bill and the answer is not disclosed in the record, and, until the circuit court does hear and finally determine these questions, this Court has no appellate jurisdiction of them. For the foregoing reasons the decree complained of will be reversed, the demurrer to the bill of Samuel Woods, commissioner, sustained, and these causes be remanded to the circuit court, to be heard and finally determined according to the rules and principles of equity.

Reversed.

CHARLESTON.

ALEXANDER v. MARLING.

Submitted June 2, 1898—Decided November 19, 1898.

VERDICT—*Instructions—Jury.*

An instruction in the following language: "If the jury believe from the evidence that the plaintiff is entitled to recover a greater sum than \$280, then their verdict should be: (1) We, the jury, find for the plaintiff, and assess his damages at \$——. Otherwise, their verdict should be: (2) We, the jury, find for the defendant,"—must be construed to mean that the verdict of the jury should be for such greater sum, inclusive of the sum of two hundred and eighty dollars, and not for the excess of such greater sum after deducting therefrom such sum of two hundred and eighty dollars. (p. 209).

Error to Circuit Court, Ohio County.

Action by E. W. Alexander against John Marling. Judgment for plaintiff. Defendant brings error.

Reversed.

FRANK W. NESBITT, for plaintiff in error.

T. M. GARVIN, for defendant in error.

DENT, JUDGE:

E. W. Alexander instituted an action of *assumpsit* in the Circuit Court of Ohio County against John Marling, claiming the sum of nine hundred and sixty-seven dollars, subject to a credit of one hundred and forty dollars. On the 9th day of September, 1896, the defendant filed a special plea tendering one hundred and forty dollars in full satis-

faction of plaintiff's demand, and also the general plea of *non assumpsit*. The plaintiff replied to the general plea, but made no reply as to the special plea, except as shown by the order of the court as follows, to wit: "And the plaintiff, by his attorney, thereupon refused to accept the said sum of one hundred and forty dollars paid into court as aforesaid, and as to the whole of the damages alleged in the said declaration against the said defendant prays judgment whether he ought to have and maintain, and of this he puts himself upon the country." This issue was submitted to a jury, which found for the plaintiff the sum of five hundred and three dollars. The defendant moved to set aside the verdict, but the court overruled his motion, and entered a judgment for the amount found by the jury; and further ordered "that the sum of \$140 heretofore paid into court be paid to the plaintiff or his attorney, such sum not constituting a part of the judgment aforesaid." The defendant, after motion made in the circuit court, now complains that such court erred in not crediting the sum of one hundred and forty dollars on the judgment. When the tender was made, the plaintiff did not accept the sum in part satisfaction and reply to the plea generally, but, as the order shows, refused to accept it unconditionally. See sections 2 and 3, chapter 126, Code. Therefore the money, although in the control of the court, still remained the defendant's.

On the trial of the issue the defendant asked and was allowed the following instruction: "The court instructs the jury that if you believe from the evidence that \$280 is sufficient compensation for the medical services rendered, and for the board and lodging furnished by the plaintiff to the defendant, then you must find for the defendant." And the court then gave the following instruction on its own motion: "If the jury believe from the evidence that the plaintiff is entitled to recover a greater sum than \$280, then their verdict should be: (1) We, the jury, find for the plaintiff, and assess his damages at \$——. Otherwise, their verdict should be: (2) We, the jury, find for the defendant." The defendant, in support of his motion, filed the affidavit of the full jury to the effect that this instruction was understood by them to

mean that in making up their verdict they should find for such "greater sum than \$280," inclusive thereof. Standing by itself, this is the clear logical and legal meaning of this instruction, although the judge may have had a different intention in his mind. Such intention he might have easily expressed in unequivocal language. In considering the instruction, the jury could not arrive at any other conclusion than that if they found the plaintiff was entitled to a greater sum than two hundred and eighty dollars they should return a verdict for such greater sum, and not for the excess of such greater sum after crediting thereon the two hundred and eighty dollars. It is a general rule that testimony of jurors will not be heard to impeach their verdict because they misunderstood the instruction of the court. *Thomp. Trials*, § 2405. But in this case the attempt is not made to impeach their verdict, but to show that such verdict is in accord with the plain and literal meaning of the instruction given. Such being the object, their testimony is wholly unnecessary, as the instruction must be construed by itself. The defendant's money was not applied to the plaintiff's debt, nor accepted by him until after the verdict was rendered, and therefore the burden is on the plaintiff to show that the verdict did not include the one hundred and forty dollars, for when the court ordered the one hundred and forty dollars to be paid over to him independent of its judgment on the verdict it virtually rendered a judgment for this amount in his favor, in addition to that already given. The only thing offered to sustain such pretention on his part is the instruction of the court referred to above. This, in its plain, literal meaning, not only does not do so, but sustains the contention of the defendant. For this reason the judgment of the circuit court, in so far as it refused credit to the defendant for said sum of one hundred and forty dollars, is reversed.

Reversed.

CHARLESTON.

BROWN *et ux. v.* MILLER'S EXECUTORS *et al.*

Submitted June 3, 1898—Decided November 19, 1898.

1. WILLS—*Conversion—Equity.*

Where a will directs land to be sold and divided among legatees, it is, in equity, a conversion of land into money. (p. 212).

2. WILLS—*Conversion—Election.*

The beneficiaries may generally prevent actual conversion by sale, and take the land; but all those entitled must unite in such election. One cannot force an election upon others. (p. 212).

Appeal from Circuit Court, Marshall County.

Bill by John W. Brown and Mary J. Brown against Henry Miller's executors and others. Decree for defendants, and plaintiffs appeal.

Affirmed.

EWING, MELVIN & EWING, for appellants.

HENRY M. RUSSELL and MEIGHEN & OLDHAM, for appellees.

BRANNON, PRESIDENT:

Miller by his will devised a tract of land to his wife for life, and directed that at her death it be sold and its proceeds divided among his children. A daughter, Mary J. Brown, owning her tenth and a share which she had purchased of another child, and her husband, who had purchased interests, so that they owned one half, filed their bill asking that the tract be partitioned in kind, and not sold as directed by the will, and stated that two sons of

the testator, who were executors, refused to allow a partition, and were going to sell the land, and prayed that they be enjoined from selling. The executors demurred to the bill, and the court held that the plaintiffs had no right to partition, and refused the injunction and dismissed the bill, and the plaintiffs appeal.

This is a bill to enforce what is called an election. Have the plaintiffs a right to an election? It is well known that where a will or a deed directs land to be sold and converted into money, or money to be invested in land, it operates as a conversion, the land assuming the character of personalty, and the money that of land, before actual conversion, and it passes to those taking under the will or deed as personalty or realty, according as the conversion is from the one to the other. *Pratt v. Taliaferro*, 3 Leigh, 419. But the party entitled to the beneficial interest may frustrate actual conversion by the exercise of the right of election, under circumstances. Being entitled to the subject, he may take the land or money in its original shape. That excellent late work, *American & English Decisions in Equity*, in volume 2, in the case of *Ingersoll's Estate*, at page 76, and elaborate note fully discusses the subject. There is one fact, if not others, that denies the plaintiffs such right of election. Their bill shows a distinct direction by the will to the executors to sell the land, and does not show that all the beneficiaries are willing to take the land instead of money. The will having thus directed a sale and conversion into money, every child had a right to have a sale, and no one could exercise this right of election without the affirmative consent of all the others. *Harcum's Adm'r v. Hudnall*, point 2, 14 Grat., 369, 376; 2 Am. & Eng. Dec. Eq., 95; 2 Lom. Ex'rs, 294. So, without saying whether or not other provisions of this will as to pecuniary legacies would demand a sale, and deny a right of election and partition in kind, the want of consent of all, which must, but does not, appear, will deny partition in kind. The bill itself shows that two sons refuse to elect to take land in kind, and thus shows a want of equity to sustain the bill, and it was properly dismissed.

Affirmed.

CHARLESTON.

FOUSE *et al.* v. GILFILLAN *et al.*

Submitted February 10, 1898—Decided November 19, 1898.

1. MARRIED WOMEN—*Wife's Separate Estate—Contracts—Charges on Separate Estate.*

G., a married woman, together with her husband, enter into a written contract, under seal, dated June 25, 1892, with F., to erect a three-story double brick building on her lot, in the city of Parkersburg, according to specifications, for which she is to pay to F., in payments as in said contract set forth, six thousand five hundred dollars, (three thousand two hundred and fifty dollars is to be paid as the work progresses, and the balance, one thousand six hundred and twenty-five dollars, in one year from the date of the completion of the work, and one thousand six hundred and twenty-five dollars in two years from the completion of the work, to be evidenced by negotiable notes, with the bank discount added), and to execute a deed of trust upon said property to secure the balance unpaid, when building is completed. This contract is signed and sealed by all the parties, but not acknowledged. On the 26th day of September, 1892, another agreement or addendum is made to said agreement, designated as: "Modification of an Agreement Made and Entered into on the 25th Day of June, 1892. This agreement, made and entered into this 26th day of September, 1892, by and between Mrs. E. M. Gilfillan and Edward Gilfillan, parties of the second part,"—which agreement provides that F., shall provide and additional story, the fourth story to be finished for a hall, and the price therefor to be agreed upon, as well as any changes in the plans that might be made, and, if the parties could not agree upon the price, their differences were to be submitted to a third party, and specifically refers to the original agreement of June 25th, and in terms makes it part of this. The addendum also set forth that the contract was made, and the price to be paid, for the improvement of G.'s separate real estate, and declared that the debt

45	213
48	649

45	213
53	430

45	213
65	668

45	213
63	696

thereby contracted was created and incurred for that purpose, and expressly charged her (lot) separate real estate, and all the improvements thereon, with the payment of said debt mentioned in the original agreement, and with the amount of any and all sums necessary to put on the fourth story, and any other modifications that might be agreed upon, which addendum and modification was also signed and sealed by the said G. and husband; and the paper, thus completed, was by them duly acknowledged on the 7th day of October, 1892, and duly recorded on the 1st day of November, 1892. *Held* to be a valid contract, under section 12, chapter 66, of the Code, as amended by chapter 109, Acts 1891, and to create a charge and liability upon said property for the price of such improvements. (p. 230).

2. **MARRIED WOMEN—*Wife's Separate Estate—Purchaser.***

A purchaser of such property takes it with notice of such charge and liability. (p. 231).

3. **NOTARY PUBLIC—*Certificate—Acknowledgment.***

The certificate of a notary public to said paper, that "E. M. G. and E. G., whose names are signed to the foregoing writing, have this day acknowledged the same before me, in my county aforesaid," is sufficient to show the acknowledgment of the whole paper dated June 25 and September 26, 1892. (p. 228).

4. **RECORDATION—*Certificate—County Clerk.***

The certificate of the clerk of the county court of the proper county to said paper, that the foregoing writing, bearing date on the 25th day of June, 1892, with the certificate of acknowledgment thereto annexed, was on the day mentioned duly admitted to record in his said office, is sufficient evidence of the recordation of the whole paper. (p. 227).

5. **IDENTITY OF DOCUMENT—*Reference—Certificate—Date—Deed.***

A reference, by the certificate of acknowledgment or of recordation to the deed as "the foregoing writing," is sufficient to identify it as the deed which was acknowledged or recorded, as the case may be, without giving the date of the deed. (p. 228).

6. **WITNESS—*Competency of Witness—Transactions with Decedent—Contracts.***

In a suit growing out of said contract, after the decease of G., the testimony of F. is competent to prove materials furnished for, and labor and work done on, the building, under the exception in section 23, chapter 130 of the Code, providing that no party to any action, suit, or proceeding shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, etc. (p. 235).

7. **WITNESS—*Competency of Witness—Transactions with Decedent—Test of Admissibility.***

In such a case the test of the admissibility of the testimony is, does it tend to prove what the transaction was? (p. 232).

Appeal from Circuit Court, Wood County.

Bill by Fred Fouse against Elizabeth M. Gilfillan and others. A decree was rendered from which complainant and defendant Herman Fouse appeal.

Reversed.

J. G. McCLUER, for appellants.

TURNER & TURNER, for appellees.

McWHORTER, JUDGE:

On the 25th day of June, 1892, Herman Fouse entered into a contract in writing with Edward Gilfillan and E. M. Gilfillan, his wife, to furnish the material and work and build a three-story double brick building on the lot of said E. M. Gilfillan according to the specifications given,—the first story to be business rooms, the second story for dwellings, and the third story for a hall,—for which building Fouse was to be paid the sum of six thousand five hundred dollars, as follows: Five hundred dollars when the stonework should be completed, eight hundred dollars additional, when the second tier of joists were on, eight hundred dollars when the building was under roof, one thousand one hundred and fifty dollars when building completed, one thousand six hundred and twenty-five dollars, in one year from date of completion, and the like amount in two years from said date; said payments to have added to them bank discount, to be included in notes to be given by the party of the second part, negotiable and payable in some bank in the city of Parkersburg, and a deed of trust to be given on the lot and building to secure their payment. This contract was signed and sealed by the parties thereto, but not acknowledged and recorded. Afterwards, on the 26th day of September, 1892, an addendum was made thereto, designated as "Modification of an Agreement Made and Entered into on the 25th Day of June, 1892," by the parties of the second part, Mrs. E. M. Gilfillan and Edward Gilfillan, to the effect "that in consideration of the premises, conditions and stipulations in said original agreement contained, it is hereby agreed that Herman Fouse shall build an additional story to the building therein mentioned," and providing that said fourth

story was to be finished for a hall, and the price to be paid was to be agreed upon between the parties, and, in case they could not agree, they were to select a third person who should fix the amount to be paid to Fouse for said work, such finding to be binding on both parties, and, further, that any and all changes in the plans of said building should be paid for at the same price for the same class and kind of work as in the original agreement specified and any work or material which might be dispensed with was to be deducted from the contract price in the same proportion and at the same price mentioned in the original agreement, and that said agreement was made and the price to be paid Fouse was for the improvement of the separate real estate of the said E. M. Gilfillan, who was a married woman, and that she thereby declared that the debt for the building of the brick house mentioned in said original agreement, which was there referred to and made a part thereof, was created and incurred for the purpose of improving her separate real estate the brick building was to be constructed upon, and that the said E. M. Gilfillan thereby expressly charged her (lot) separate real estate, and all the improvements thereon, with the payment of said debt mentioned in the original agreement, and with the amount of any and all sums necessary to put on the fourth story, and any other modifications that might be agreed upon. To this modification and addition were annexed the signatures and seals of the said Mrs. Elizabeth E. Gilfillan and Edward Gilfillan, and to which was annexed the following certificate of acknowledgment and certificate of recordation:

"State of West Virginia, Wood County, to wit: I, Walter E. McDough, a notary public of said county, do certify that Mrs. Elizabeth M. Gilfillan, and Edward Gilfillan whose names are signed to the foregoing writing, have this day acknowledged the same before me in my county aforesaid. Given under my hand this 7th day of October, 1892. Walter E. McDough, Notary Public."

"State of West Virginia, Wood County Court Clerk's Office, November, 1, 1892. The foregoing writing, bearing date on the 25th day of June, 1892, with the certificate of acknowledgment thereto annexed, was this day admit-

ted to record in said office. Teste: B. F. Stewart, C. W. C. C."

On the 12th day of December, 1892, the said Herman Fouse and Fred Fouse entered into an agreement reciting the agreement of June 25, 1892, together with its modification of September 26, 1892, and that in consideration of one thousand dollars then delivered by Fred to Herman, and the agreement of Fred to furnish to Herman money from time to time until the buildings should be completed, Herman assigned to Fred the said writings and agreements of June 25 and September 26, 1892, and made said agreements part of their said agreement, as exhibits therewith, which agreement of December 12, 1892, was signed and sealed by the parties thereto, and duly acknowledged and recorded on February 7, 1893. On the 10th day of August, 1893, the said E. M. Gilfillan, and Edward Gilfillan, her husband, entered into a further agreement with Herman Fouse, reciting the agreement of June and September, and making the same a part of the said agreement of August 10, 1893, and stating that under said agreements Herman Fouse was to construct for said Elizabeth M. Gilfillan, on her lot in Parkersburg, a four-story brick house, as in said agreements and modifications specified and set forth; that Fouse had gone to work on said house, and payments on such work and material done and furnished had been made by said E. M. Gilfillan, but the house was not completed, and there had not been agreed upon, or in any way fixed, the price to be paid for the fourth story to and in and on said house, and agreed and contracted with each other to stop the work on the house, and to settle with each other for the work that had been done upon, in, and on said house upon the basis and according to the terms and conditions in said agreements in writing set forth and specified, and agreed to an arbitration of any and all matters growing out of the business dealings theretofore had between the parties thereto, and especially between the said E. M. Gilfillan and Herman Fouse, and agreed that all such matters should be submitted for arbitration to three disinterested persons for final decision (arbitrators to be chosen, one by each party, and the two to choose a third), and that the decision of any two

should be binding on both the parties, and their award to be entered up as the judgment of the circuit court of Wood County, by decree on chancery side thereof, at the July term, 1893; that said award should be rendered, and report to the circuit court made, within ten days from the date of the agreement, and the parties waived any rule or summons for entering said award as judgment of the court, and the parties agreed and bound themselves to and with each other to abide by and perform any such award and judgment, which agreement was duly signed, sealed, and acknowledged by the parties thereto. And on the 10th day of August, 1893, said parties chose their respective arbitrators, who chose the third, who rendered their award August 18, 1893, finding the sum of one thousand three hundred and forty-nine dollars and eighty-nine cents, in favor of Herman Fouse as due from E. M. Gilfillan. On the 7th day of October, 1893, Elizabeth M. Gilfillan and Edward, her husband, conveyed, by deed of that date, the lot and building, so erected, but not completed, to the appellee M. J. Hughes, in consideration of seven thousand dollars, of which one thousand two hundred and fifty dollars was paid in cash, and certain other sums, recognized as valid liens on said property, assumed to be paid to the holders thereof by said Hughes; and for the residue of purchase money, being eight hundred and three dollars and eighty-eight cents, the said Hughes made his note at ninety days, negotiable and payable at the First National Bank, to said E. M. Gilfillan, the vendor retaining her vendor's lien on said property to secure the payment of said unpaid purchase money, which deed was duly acknowledged and recorded on the 9th day of October, 1893, a copy of which deed is exhibited with the bill of plaintiff, Fred Fouse, hereafter mentioned.

At the January rules, 1894, Fred Fouse filed his bill in chancery against Elizabeth Gilfillan, Edward Gilfillan, Herman Fouse, M. F. Tetrick, Jacob Young, Martin J. Hughes, and others, alleging the contract of June 25th and September 26th between Herman Fouse and the Gilfillans, and setting up the assignment thereof by Herman Fouse to plaintiff, and exhibited said agreements and assignment with his bill; that under said assignment he had furnished

Herman Fouse the sum of two thousand three hundred and eleven dollars and twenty-seven cents, which went into the material used in the construction of said building, and to pay laborers who worked thereon, whereby Herman was enabled to proceed with the building until the Gilfillans were unable, failed, and refused to pay the money under the contract; that Herman stopped work from no fault of his, but did so because of the failure of Gilfillan; that Herman stopped work about the middle of the summer of 1893, at which time he had furnished material and done work to amount of eight thousand eight hundred dollars; that they had paid him on account thereof three thousand four hundred dollars, leaving five thousand three hundred and sixty dollars still due Fouse, less whatever amount they may have paid Thomas Savage, which plaintiff was informed was about six hundred and sixty dollars; that several parties had filed mechanics' liens; that the lien of M. F. Tetrick should be only three hundred and ninety-one dollars and seventy-seven cents, instead of nine hundred and eighty dollars and fifteen cents, as claimed; that no part of plaintiff's demand of two thousand three hundred and eleven dollars and twenty-seven cents advanced by him to Herman under their contract of December 12, 1892, had been paid by said Gilfillans, although they often promised to do so, nor had it been returned to him by Herman, and that the Gilfillans had due notice, and agreed in the presence of Herman to pay it, and that the property was liable to plaintiff for it,—and prayed that the cause be referred to a commissioner to ascertain what was due and unpaid to the various persons who performed labor on the building erected by Herman under the contract, and to whom and what materials furnished, and by whom, what amount was due from Gilfillans to Herman under the contract, what amounts had been paid him, what the value of the property, and how much was paid for it by Hughes, and what amount was still due from Hughes upon the purchase of said property; that the parties named as defendants be required to answer under oath; that plaintiff's contract with Herman be specifically enforced; that plaintiff's claim be decreed out of whatever might be found to be due to Herman from the Gilfillans under his contract with them,

after the payment of the amount of all material, lumber, etc., which went into the building, and the labor upon said building, up to the time Herman quit work upon same; that the lien of Tetrick be corrected and set aside, except as to the amount of lumber furnished by him which actually went into the building, and that plaintiff's claim, to that extent, be declared to be a lien upon the property, and the property sold to pay it, and for general relief.

Herman Fouse answered the bill, admitting the contract made with Gilfillans of June 25, and September 26, 1892, and with plaintiff of December 12, 1892; that under the contract with plaintiff he had received from plaintiff two thousand three hundred and eleven dollars and twenty-seven cents, which had not been returned to plaintiff by him, nor paid by the Gilfillans; averring that up to the time when he quit work under his contract, in the summer of 1893, the work and material he had done and furnished amounted to eight thousand eight hundred dollars; that all he had been paid was three thousand four hundred dollars, and that there was then due him from Gilfillans five thousand three hundred and sixty dollars, unless they had paid to Thomas Savage a claim he had against respondent for six hundred and sixty dollars, for which they would be entitled to credit, if paid; that the Gilfillans were cognizant and had notice of the agreement between respondent and plaintiff, and that the same was recorded, as alleged in plaintiff's bill; that Tetrick's lien should be corrected to three hundred and ninety-one dollars and seventy-seven cents, as alleged; that the amount due respondent constitutes a lien upon the property as against the Gilfillans, and also as against any other of his co-defendants who became the purchasers of said property with notice,—and prays for affirmative relief, in that the cause be referred to a commissioner to ascertain and report amount of work performed and material furnished by him upon and for the building, the amount of money paid him under the contract, what amount of lumber was furnished by Tetrick to respondent which was used in the building, what amount is due respondent from the Gilfillans, and to plaintiff as assignee of respondent under the contracts.

Defendant Martin J. Hughes demurred to the bill, and,

without waiving his demurrer, filed his answer, admitting the contract of June 25, 1892; that it was signed by the parties, but never recorded; that afterwards, on the 26th day of September, 1892, said Herman Fouse, of the one part, and Elizabeth M. Gilfillan and Edward Gilfillan, her husband, of the other part, entered into another agreement in writing, styled, "Modification of the Agreement Made and Entered into on the 25th Day of June, 1892," and averred that said contracts of June 25 and September 26, 1892, were absolutely null and void and of no effect; that the same do not comply with the requirements of section 12, chapter 66, Acts 1891, concerning the separate property, rights, powers, and privileges of married women; that all of said work and material done and furnished, respectively, upon said building, were done and furnished under said contracts, and that the same created no liability whatever against Mrs. Elizabeth M. Gilfillan, or any of her separate personal or real estate; that respondent was advised, and so charged, that the contract of September 26, 1892, was an entire contract, and that the statute aforesaid required that the amount of the whole debt created thereby be stated therein; that in case the court should hold that the contract was void as to the fourth story, and for the additional and extra work, so called, and the additional materials furnished for the three stories as originally contracted for, then Herman Fouse had been fully paid for all the work done and material furnished upon and for said three stories, and much more. Respondent denied that Herman had done eight thousand and eight hundred dollars worth of work and material furnished, as alleged, or that Gilfillan had paid him only three thousand four hundred dollars, or that there was still due him five thousand three hundred and sixty dollars on said contract, or any other amount; averred that Herman did proceed with the work until some time during the year 1893, but that he quit work without any fault or failure on the part of Gilfillan to comply with her contract, but that he failed, neglected, and refused to proceed further with the construction of the house, and abandoned the work after Gilfillan had paid him more money than he was entitled to under the contract at that time; that all and every part of work

done and material furnished up to that time had been performed and furnished upon and in the construction of the first three stories. Respondent denied notice or knowledge of the contract between plaintiff and Herman Fouse until after his purchase of the property; denied that plaintiff advanced Herman the one thousand dollars at date of assignment, or the residue of two thousand three hundred and eleven dollars and twenty-seven cents; that at the time of said assignment, December 12, 1892, Herman was insolvent, and plaintiff knew the fact; and that in order to evade the payment of the said debts, and keep the benefits and profits which might arise from the construction of said house, plaintiff and Herman conspired together to cheat and defraud the creditors of Herman and the Gilfillans, and entered into and caused said assignment to be placed upon record; and averred that said assignment was not only fraudulent in fact, but was fraudulent on its face, and that plaintiff was not entitled to one cent under it; denied notice to Gilfillan of said contract prior to September 1, 1893; averred that on the 7th day of October, 1893, he purchased the property without any knowledge of the contract of December 12, 1892, between Fred and Herman Fouse; that he agreed to pay and did pay certain mechanics' liens upon the property, as part of the purchase money. Respondent set up the agreement of August 10, 1893, between Mrs. E. M. Gilfillan and her husband, Edward Gilfillan, and Herman Fouse, agreeing that work on the house should be stopped, and submitting their settlement for the work already done and material furnished to arbitration; also set up the fact of such arbitration, with date and amount of the award of the arbitrators, and averred certain omissions of credits to Mrs. Gilfillan by the arbitrators.

Defendants Elizabeth M. Gilfillan and Edward Gilfillan filed their demurrer and answer to the bill; admitted the contract of June 25, 1892, and the modification thereof on the 26th of September, 1892, but averred that said contracts were absolutely void and of no effect; that they did not comply with section 12, chapter 66, Acts 1891; that the work done and material furnished were done and furnished under said pretended contracts, and created no

liability whatever against respondent, or any of her separate personal or real estate, or against respondents, or either of them; that said contract of September 26, 1892, was an entire contract, and that the statute required that the whole amount of the debt created thereby be stated therein; that if the court should hold that said contract was void as to the fourth story of the building, and for the additional and extra work, so called, and additional materials furnished for the three stories originally contracted for, then Herman Fouse had been fully paid for all work done and materials furnished upon and for said three stories, and much more,—so much more as was necessary to pay for all the material and labor furnished by said Fouse in the construction of said fourth story; denied that the work and material which had been done and furnished at the time work stopped amounted to eight thousand eight hundred dollars, or that respondents had only paid Fouse three thousand four hundred dollars, or that there was still due him five thousand three hundred and sixty dollars, or any other sum; admitted that Herman Fouse proceeded with the work until some time during the year 1893, when he failed, neglected, and refused to proceed further with the work, and abandoned it, without any fault or failure on the part of respondents, and after he had been paid more money than he was entitled to under the contract at that time; denied that Fred Fouse advanced to Herman either the one thousand, or the residue of the two thousand three hundred and eleven dollars and twenty-seven cents, as claimed by Fred; averred that at the time of said contract between Herman and Fred Fouse, December 12, 1892, Herman was insolvent, which fact was well known to Fred Fouse, and that the said contract was made and placed on record to evade the payment of said debts, and keep the profits and benefits that might arise from the construction of said building; that said Herman and plaintiff conspired to cheat and defraud the creditors of Herman as well as respondents and entered into said agreement, and put it upon record, for that purpose, and that said agreement was not only void in fact, but void upon its face, and that plaintiff was not entitled to one cent thereunder; denied that the lien of M. F. Tetrick was

incorrect, set up the agreement between respondents and Herman Fouse of August 10, 1893, to submit their differences to arbitration upon the basis and in accordance with the terms and conditions of the agreements of June 25 and September 26, 1892, and averred that Fred Fouse had full knowledge of, and acquiesced therein, and that an award was made thereunder by the arbitrators as of August 18, 1893, finding one thousand three hundred and forty-nine dollars and eighty-nine cents in favor of Herman Fouse, and exhibited a copy of the said award with their answer, and averred that credits which were omitted by the arbitrators would properly reduce the amount to one hundred and thirty dollars and thirty-four cents, and denied that even that sum was a lien or charge upon said building; averred that Elizabeth M. Gilfillan was the owner of other large, separate real estate, situate in Wood County, totally unincumbered, of sufficient value to satisfy even a decree for the amount claimed by Herman and Fred Fouse, and that, if she be in any way bound to said Herman or Fred Fouse for any sum on account of said contracts, the same should be made out of her said other separate estate, to the exclusion of the property purchased by Hughes from her; and prayed for affirmative relief that said award should be corrected by allowing the credits omitted by mistake of the arbitrators, and that the contracts of June 25 and September 26, 1892, be declared null and void and canceled, and for general relief.

On the 3d day of January, 1895, the cause came on to be heard upon the demurrers, which were overruled, the several answers filed, and general replications thereto; and the cause was referred to W. W. Jackson, one of the commissioners of the court, to ascertain and report upon the matters raised by the pleadings in the cause. On the 16th day of July, 1896, said commissioner tendered his report, together with the exceptions thereto, which was filed by the court; and on the 27th day of November, 1896, the cause was finally heard upon the report of Commissioner Jackson, and the eight exceptions thereto, when the court overruled all of said exceptions, except the eighth, which was sustained, and decreed "that the commissioner should have found and reported that there were no liens upon the

house and lot in the bill and exhibits mentioned and described, and that no liens existed for any amount that was or may be due from the Gilfillans on account of the construction of the house under the contract of June 25, 1892, and September 26, 1892, upon said lot and building, and in that particular the court doth correct said report, and so finds," and proceeded to decree that said contract of June 25th and September 26th created no lien upon said house and lot, and that defendant Hughes, when he purchased the same, took them free from any lien or other liability arising out of said contract, and that said Hughes and said house and lot are not liable to the said Herman Fouse or Fred Fouse for any sum upon any demand made in the bill and proceedings; and dismissed the bill as to said Hughes, and decreed that said Fred and Herman Fouse, or either of them, recover nothing of the said Hughes, and that said house and lot are liable in no way to any of said demands made in the bill and proceedings; and the court further decreed that it appeared that at the time of the execution of the contract of June 25 and September 26, 1892, said E. M. Gilfillan owned property other than the house and lot, and the court not then deciding whether such other property and said Gilfillans are liable to said Fred Fouse and Herman Fouse, or either of them, for any amount, the cause was continued, and plaintiff granted leave to file an amended bill within sixty days of the rising of the court, if he should be so advised. From which final decree said Fred Fouse and Herman Fouse appealed to this Court, and assign the following errors:

"The court erred in sustaining exception 8 to the commissioner's report, in this: that the court overruled the finding of the commissioner that the claim of Herman Fouse against E. M. Gilfillan for \$1,256.02 was a lien upon the property of E. M. Gilfillan under the contracts of June 25 and September 26, 1892, entered into between Herman Fouse, E. M. Gilfillan, and Edward Gilfillan. Second. The court further erred in said decree in declaring that the said Fred Fouse, Herman Fouse, nor either of them should recover anything of Martin Hughes, and the said house and lot were liable in no way to any of the demands made in the said bill of complaint of Fred Fouse filed in

this cause. Third. The court further erred in correcting Commissioner W. W. Jackson's report as to his finding that the claim of Herman Fouse, ascertained by the commissioner at \$1,256.02, was a lien upon the property of E. M. Gilfillan, and by decreeing that the said property was not liable for the payment of the said debt to Herman Fouse. Fourth. The court further erred in decreeing that the plaintiff took nothing by his appeal filed in this cause, and virtually dismissed the same as to all parties defendant except Edward Gilfillan. Fifth. The court further erred in its statement in said decree of the fact, which was the dictum of the court, and which does not appear from the record, that Edward Gilfillan was the owner of real estate at the time (on the 25th day of June, 1892), and leaving the plaintiff, Fouse, to prosecute his claim against Edward Gilfillan. Sixth. The court further erred in not decreeing that the claim of Herman Fouse, as ascertained by Commissioner Jackson, was a valid and subsisting lien upon the house and lot mentioned in the bill and proceedings in the cause, and that the said house and lot of ground were bound for the payment of the same in the hands of the purchaser, Martin Hughes. Seventh. The court further erred in not decreeing that the labor and material furnished by Herman Fouse, and placed in the said building, was not a permanent improvement upon the real estate of Mrs. E. M. Gilfillan, placed there under and by virtue of a contract with her, and that the amount found by W. W. Jackson, commissioner, as due to Herman Fouse for the materials furnished, and for the erection of said building, should be, and was, a lien upon the said property under her contract with him of June 25 and September 26, 1892, and that Fred Fouse, the plaintiff in this cause, was entitled to said amount under his contract with Herman Fouse as of date the 12th day of December, 1892. Eighth. The court further erred in not decreeing that M. Tetrick should only be allowed for the value of the lumber and material furnished by him to Herman Fouse which actually was used in the construction of the building upon the Gilfillan lot under his mechanic's lien filed in this case."

The principal questions involved in this case are whether

the contract made between Elizabeth Gilfillan and Edward Gilfillan, her husband, of the one part, and Herman Fouse, of the other part, dated June 25, 1892, and modified by an addendum thereto on the 26th day of September, 1892, was duly executed, acknowledged, and recorded, and a valid contract, and whether appellee Hughes had notice thereof when he purchased the property from Mrs. Gilfillan, and took conveyance therefor. This contract was executed while that remarkable provision enacted by the legislature of 1891, in re-enacting section 12, chapter 66, of the Code, was in force. The first part of the contract, dated June 25th, was signed and sealed by all the parties thereto, but neither acknowledged nor recorded. Under said section, as re-enacted in 1891, both acknowledgment and recordation were necessary to its validity. On the 26th day of September, 1892, the said E. M. Gilfillan, desiring a change in the plan of the building, by adding a fourth story thereto, together with her husband, Edward Gilfillan, extended the contract by adding thereto, and in explicit terms contained in the last part of the contract, made that part of the contract dated June 25, 1892, a part of that dated September 26, 1892. When the last paper was signed and sealed by the said Gilfillans, the paper, as then completed, was duly acknowledged on the 7th day of October, 1892; and on the 1st day of November, 1892, the whole paper was admitted to and spread upon the record together in the proper clerk's office in Wood County. It is insisted that the addendum, being dated the 26th day of September, 1892, was not recorded, because the clerk, in his certificate of recordation, refers to it as, "The foregoing writing, bearing date on the 25th day of June, 1892, with the certificate of acknowledgment thereto annexed, was this day admitted to record in said office," and failed to mention the modification or addendum by its date, although it follows immediately, spread upon the records with it. The addendum was what it purported to be,—a "modification of an agreement made and entered into on the 25th day of June, 1892," which modification was made on the 26th day of September, 1892, and made the whole one instrument. Suppose the clerk, in his certificate, had referred to the paper as dated September 26, 1892, which

refers to another dated June 25, 1892, and makes it a part of it, which paper so referred to is recorded with it; will it be contended that the same was not acknowledged and recorded with, and as part of it? The certificate of the notary taking the acknowledgment treats it as one instrument, certifying that "Mrs. Elizabeth M. Gilfillan and Edward Gilfillan, whose names are signed to the foregoing writing, have this day acknowledged," etc. The only object in referring to the date, either in certificate of acknowledgment or recordation, is to identify the instrument acknowledged or recorded. *Adams v. Medsker*, 25 W. Va., 128. The words "foregoing writing," in the clerk's certificate, would have been a sufficient identification, without giving any date; or, if he had referred to the writing as dated September 26, 1892, it would have been a proper and sufficient reference to the whole paper, because that part dated September 26th refers to that dated June 25th, and makes it a part thereof.

But it is contended that the contract is an absolute nullity, because it does not comply with the provisions of section 12, chapter 66, of the Code, for the further reason that it fails to state the whole of the amount of the debt. Said section provides, "But every such charge must be evidenced by a writing duly executed and acknowledged by her, and duly recorded in the proper clerk's office, stating the amount of the debt and for what it was created." We have seen that the writing was duly executed, acknowledged and recorded. This married woman, Mrs. Gilfillan, was the owner of a valuable lot in the business part of the city of Parkersburg, and desired to have erected thereon a double brick building,—the first story to be business rooms, the second for dwellings, and the third for a hall,—and on June 25, 1892, undertook to contract in writing with Herman Fouse, a builder, to furnish the labor and material, and build it, for the gross sum of six thousand five hundred dollars. After work was begun under this contract, although it was not yet complete by acknowledgment and recordation, she decided to change the plan and add another story, which would necessitate some extra work, also, on the lower stories to make the walls strong enough to support the additional work, so that to the contract already

written and signed was added the modification mentioned, and the contract completed. This contract was for the purpose of improving her separate estate, by erecting the building thereon, and, by its terms, expressly charged the property, her separate estate, and all the improvements thereon, with the payment of said debt mentioned in the original agreement, six thousand five hundred dollars, and "with the amount of any and all sums necessary to be put on the fourth story, and any other modifications that might be agreed upon." There can be no question about the contract being sufficient, to the extent of the debt specified in the contract; and there is a distinct provision in the contract of June 25, 1892, to secure by deed of trust a balance of three thousand two hundred and fifty dollars, and no provision for deferred payments made in that part of the contract for the fourth story and changes dated September 26th. Work proceeded and payments were made under said contract until in the summer of 1893, when, by mutual consent, the work was stopped on said building, and the parties agreed to submit to arbitrators the matters in difference between them, and to settle to and with each other for the work that had been done upon and in and on said house upon the basis and according to the terms and conditions as in said agreements of June 25 and September 26, 1892, set forth and specified, as shown by a contract in writing between said Elizabeth M. Gilfillan and Edward Gilfillan, her husband, and Herman Fouse, dated August 10, 1893, which contract was duly acknowledged by the parties, and referred to both in the answer of defendant M. J. Hughes and in that of E. M. and Edward Gilfillan, and which contract was brought to this Court on *certiorari* sued out on motion of appellee Hughes, as part of the record in the cause.

On the —— day of February, 1893, the legislature re-enacted chapter 66 of the Code, and repealed the restrictions and limitations upon married women in relation to charging their separate property and estate, as contained in said section 12, chapter 109, Acts 1891 (section 12, chapter 66, Code); and by said contract of August 10, 1893, Mrs. Elizabeth M. Gilfillan recognized the said contract of June 25th and September 26th as valid and binding, and

agreed thereby to settle, upon a *quantum meruit* for the work already done; and the record shows that the parties actually went on under the said contract of August 10, 1893, and tried their matters before the arbitrators selected thereunder, who returned an award finding on the hearing of the whole matter in favor of Herman Fouse the sum of one thousand three hundred and forty-nine dollars and eighty-nine cents. Appellee contends: "There can be no recovery upon a *quantum meruit*, since the labor was performed under a special contract. Fouse could only claim to recover the contract price, first having shown that he had fully executed it,"—and cites many authorities in support of this proposition. His proposition of law is not objectionable, but it has no application to this case as it stands. The work was not completed,—the Fouses say, because of the failure of the Gilfillans to comply with their contract; the Gilfillans say, because Fouse failed to proceed with the work, and abandoned it, without fault on their part. Whether the one or the other was in default, what boots it, when the parties come together and agree, in writing under seal, duly acknowledged, on the terms of settlement? The work already done is accepted by Mrs. Gilfillan, to be paid for as the arbitrators may decide. Mrs. Gilfillan was authorized by law to make such contract, and until long after it was made she had shown no disposition to repudiate the contract of June 25 and September 26, 1892, so far as the record shows. The amount remaining unpaid is far less than the sum she bound herself to secure by deed of trust under the first part of the contract, which was a sum certain. What notice had appellee Hughes of any charges against the property when he took the conveyance thereof from the Gilfillans on October 7, 1893? The contract of June 25 and September 26, 1892, was on record. The contract of December 12, 1892, between Fred Fouse and Herman Fouse, was on record. The deed from the Gilfillans to Hughes recited several mechanics' liens existing on the property, which Hughes assumed to pay as part of the purchase money, which mechanics' liens, recognized by both Mrs. Gilfillan and Hughes as valid liens, were based and depended upon the contract of record dated June 25 and September 26, 1892,

which appellee contends was absolutely null and void and of no effect; and the contract of August 10, 1893, set up by Hughes in his answer, had been executed and acknowledged two months prior to the date of his deed from the Gilfillans, and he nowhere negatives the fact of his knowledge of its existence at the time of his purchase, although the paper is introduced into the case by himself. Story, in his *Equity Jurisprudence* (section 299), says: "Constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted;" and in section 400 he says: "An illustration of this doctrine of constructive notice is, when the party has possession or knowledge of a deed, under which he claims his title, and it recites another deed which shows a title in some other person, then the court will presume him to have notice of the contents of the latter deed, and will not permit him to introduce evidence to disprove it." Appellee Hughes accepts a deed from the Gilfillans, which requires him to pay, as part of the purchase price, certain mechanics' liens resting on the property purchased, which liens show on their face that they are for materials and work furnished and done upon said property for Herman Fouse, contractor, by virtue of a contract made between Herman Fouse and E. M. Gilfillan and Edward Gilfillan. This is certainly enough to put the purchaser on inquiry as to all liens that might attach to the property under said contract, or growing out of it. As stated in *Reed v. Gannon*, 50 N. Y., 349, "It was such notice as, in the language of the authorities, 'would lead any honest man, using ordinary caution, to make further inquiries.'" In the same case Justice Rapallo says: "Notice of any fact calculated to put the party on inquiry is, in the absence of explanation by him, sufficient to charge him with notice of all instruments which on inquiry would be disclosed." Wait, *Fraud. Conv.* § 373; *Townsend v. Little*, 109 U. S., 504, (3 Sup. Ct., 357), and cases cited.

Appellee's exceptions, Nos. 1 to 6, inclusive, to the commissioner's report, go principally to items of account about which proof is taken, and insist that the commissioner erred in allowing credit to Fouse for any labor em-

ployed upon said building, or for material furnished therefor, concerning which Herman Fouse testified, for the reason that said Fouse is incompetent as a witness in said cause because of the decease of E. M. Gilfillan, under section 23, chapter 130, Code 1891. Appellee cites the case of *Owens v. Owens*, 14 W. Va., 88, in support of his exceptions on this point. JUDGE HAYMOND, in discussing the question says: "A contract, whether express or implied by law, is a transaction. And it seems to me that when one person testifies that he did work and labor for another generally, he must be taken as testifying to a transaction, in legal contemplation, between him and such other person, within the true meaning and intent of the law now under consideration. Because the testimony of the witness tends to prove, in legal effect, not only a request to do the work, but also a promise to pay him therefor what the same was reasonably worth, and also that he did the work in consideration of said request. The doing of the work and labor is the consideration of the contract or promise to pay, whether express or implied, and, it seems to me, cannot be separated from the contract or transaction very easily." That was an action by Miss Owens against the estate of her deceased brother for services rendered him in his lifetime, under an implied contract, if any, which she was undertaking to establish by her own testimony; and, as the judge well said, the doing of the work and labor was the consideration of the contract or promise to pay, and cannot very easily be separated from the contract or transaction; and he further (on page 95) gets at the gist of the whole matter by the question, "Does the testimony tend to prove what the transaction was?" This is the true test. In the *Owens Case*, the circuit court had permitted the plaintiff to prove the whole transaction with the deceased, and it was not easy, by any means, to separate the doing of the work, the consideration of the contract or promise to pay from the contract or transaction. In *Strong v. Dean*, 55 Barb., 337, where a similar question arose under the provision of the statute of New York, that a party should not be allowed to be examined as a witness in his own behalf "in respect to any transaction or communication had personally by said

party, with a deceased person against parties who are executors or administrators of such deceased person," it was held, "In such a case the test of the admissibility of the testimony is, does it tend to prove what the transaction was?" In *Stanley v. Whitney*, 47 Barb., 586: This was an action on a note for eight hundred and ninety-six dollars brought by the administrator of the obligee or payee. Defendant testifies in his own behalf that the only consideration he received for the original note was the sum of eight hundred dollars, paid him by one R. Held, "that this was in fact testifying to a transaction between the defendant and the deceased intestate, and that the evidence was therefore erroneously admitted." Defendant had testified that he received nothing from the intestate, except the eight hundred dollars which he received from R.; showing precisely, as stated by the court, "what the transaction was between himself and such intestate. It touched the very point in dispute, to wit, that the agreement was usurious and void." The court further say: "It was most clearly a part of the transaction between them, that no more than \$800 was advanced as the loan upon which the \$800 note was predicated. It is of no consequence what the form of the question or answer was. Evidence to rebut a legal presumption may be just as effectual and as pertinent to establish the true nature and character of a given transaction when used in a negative as in an affirmative form. The only question is, does it tend to prove what the transaction was?" In the case of *Belden v. Scott*, 65 Wis., 425, (27 N. W., 356), upon a claim against the estate of a decedent for the value of services rendered during his lifetime in examining and correcting his books of account, plaintiff was asked: "(1) About what time did you commence to work upon those books? (2) Up to what time did you perform labor on those books? (3) What amount of time did you spend in labor on those books? (4) How much time between the 1st of June, 1879, and the 1st of September, 1881, did you spend in labor upon those books of Mr. Caswell? (5) How much time did you spend between those dates in labor upon those books when Mr. Caswell was not present? (6) What was the value of the services performed by you up-

on those books between June 1, 1879, and September 1, 1881? (7) What was the value of the services performed by you when Mr. Caswell was not present, between those dates?" These questions were ruled out by the trial court on the ground that they called for transactions or communications between the deceased and the party. Plaintiff then made the general offer to prove by himself, as a witness, "that the time spent upon those books between June 1, 1879, and September 1, 1881, amounted in all to about one year, and that its value was in the neighborhood of \$1,500," which was also refused on the same grounds. The court say: "There can be no question of the competency of this evidence. * * * The statute is not hostile to the proof of all just claims against estates. It was made to protect estates from claims depending upon personal transactions or communications between the claimants and the deceased, established by the testimony of the claimants in the absence of the testimony of the deceased to controvert it." In the case of *Daniels v. Foster*, 26 Wis., 686, the defendant introduced a letter to himself, purporting to have been written by plaintiff's testator, acknowledging the payment of the mortgage sued upon, and stating that he had made a discharge, which he would forward, etc., which letter defendant stated he had received in the mail from the testator. The court say: "The case does not seem to come within the letter of the statute, and yet the communication was in some sense personal. But the personal transaction or communication of the statute, no doubt, means a transaction or communication face to face, or by the parties in the actual hearing and presence of each other. In every such case the statute excludes the testimony of the living party, upon the obviously wise and just ground that his adversary, whose cause of action or defense survives, and who was possessed of equal knowledge, and equally capable of testifying to what the transaction or communication really was, has been removed by death, and so cannot confront the survivor, or give his version of the affair, or expose the omissions, mistakes, or perhaps falsehoods, of such survivor. * * * The law has, therefore, wisely excluded him." In *Stewart v. Stewart*, 41 Wis., 624, the court held that: "Though the

grantees in a deed, after the death of their grantor, are not competent witnesses in their own behalf to prove any personal transaction or communication had between them and the deceased grantor, and cannot testify that he delivered the deed to them, nor state any conversation between him and themselves thereto, yet they may testify to other facts which have a bearing upon the question of delivery (as that the deed was in their possession or under their control from the day of its date until they placed it on record;) and the refusal to permit such testimony in this case was error."

Fouse is a competent witness in his own behalf, under section 23, chapter 130, of the Code, in this case, except only "in regard to any personal transaction or communication between himself and the deceased." The contract of June 25 and September 26, 1892, which was the only personal communication or transaction between them prior to the time that Fouse quit work on the building, was complete in itself, and was on record. And what Fouse might testify to as to furnishing labor on or material for the building could in no possible way tend to prove what the transaction was between them. I do not feel that I could go so far as the court went in *Belden v. Scott, supra*, which was a case quite similar to that of *Owens v. Owens, supra*, in which it is held "that the circuit court erred in permitting the plaintiff to testify as a witness in her own behalf as to her work and labor and services rendered for the deceased, and what things she did in and about the work and labor she claimed to have performed for the deceased in his lifetime, whilst she lived with him, and had taken charge of the household affairs of the deceased, and had sold produce and bought provisions for the house with such produce, and had nursed deceased in his sickness." Syl. point 1. In *Page v. Danaher*, 43 Wis., 221 (Syl. point 2): "In an action by executors upon a note alleged to have been executed and delivered by defendants to plaintiffs' testator, and in which he is named as payee, but which defendants allege to have been altered after execution, one of the defendants, as a witness for the defense, might properly be asked when and with what ink he signed the note, whether he struck out words in the printed form

which appeared to have been stricken out, and other questions which did not call for any transaction or communication had by defendants with such testator personally."

Appellant Fred Fouse was not a party to the contract of August 10, 1893, between Herman Fouse and Gilfillan, and was not bound by the award; but he seems to have made no claim for any amount beyond what, on a fair settlement appears to be due to Herman, and only claims that in his bill. He contested no payments made to Herman after the contract of assignment made on December 12, 1892; and, under all the circumstances of this case, he should not recover anything more than the amount found to be due to Herman on his contract with the Gilfillans, the sum of one thousand two hundred and fifty-six dollars and two cents as found by Commissioner Jackson.

The court erred in sustaining appellees' eighth exception to the commissioner's report, and in finding that the contract of June 25 and September 26, 1892, created no lien or charge upon the property, and that appellee Hughes, when he purchased the property, took it free of liens or other liability arising out of said contract, and in dismissing the bill as to said Hughes, and giving judgment for costs. Said decree of November 27, 1896, is reversed and set aside, and the case remanded, with directions to the circuit court to decree to appellants the said sum of one thousand two hundred and fifty-six dollars and two cents, with interest from August 10, 1893, and that provision be made in said decree for sale of the property to satisfy the same, unless the same shall be paid by a day to be named in said decree; and this cause is remanded to the circuit court of Wood County for further proceedings to be had therein accordingly.

Reversed.

CHARLESTON.

GALLOWAY v. STANDARD FIRE INSURANCE CO.

45	237
48	261
45	237
55	425

Submitted June 2, 1898—Decided November 19, 1898.

1. INSURANCE—*Policy—Contracts—Locus Contractus.*

Where application is sent by an applicant or his agent from one state to an insurance company of another, and there accepted, and a policy of insurance is there issued, it is a contract of the of the state where issued. (p. 239).

2. CONTRACTS—*Locus Contractus—Acceptance.*

Generally, the place of the acceptance of a proposal is the place of contract. (p. 240).

3. CONTRACTS—*Delivery—Postoffice.*

A deposit of a contract in a post office addressed to the party to whom it is to be delivered is a delivery at the post office. (p. 240).

4. PAYMENT—*Debtor—Creditor.*

A debtor must seek his creditor to pay him, unless the creditor be out of the State. (p. 241).

5. INSURANCE—*Policy—Contracts—Locus Contractus.*

If a policy of insurance provides that it shall not be valid until countersigned by its agent at a certain place, it is a contract of the state where so countersigned. (p. 240).

6. INSURANCE—*Policy—Limitation of Action—Waiver—Estoppel.*

Where a policy of insurance provides that suit must be brought upon it within six months after loss by fire, and there is a promise by the company, within the six months, to pay the policy, and the whole period runs out before the company refuses to pay, such promise is a waiver of the limitation, and estops the company from pleading it, and is not a mere suspension of time from the promise until the refusal to pay. (p. 242).

Error to Circuit Court, Ohio County.

Action by C. F. Galloway against the Standard Fire Insurance Company. Judgment for defendant, and plaintiff brings error.

Reversed.

WHITE & ALLEN, for plaintiff in error.

W. P. HUBBARD, for defendant in error.

BRANNON, PRESIDENT:

This is an action by Galloway against the Standard Fire Insurance Company to recover for a loss by fire of a stock of goods insured by a policy issued by the company, resulting in a finding by the court trying the case in lieu of a jury in favor of defendant, and judgement for it. The plaintiff sued out a writ of error. The policy contained a clause that no suit upon it should be sustained unless commenced within six months after the fire, and the company pleaded this contractual limitation in bar of the action and the plaintiff tendered three replications, which were rejected. The case turns upon whether the circuit court was right in the rejection of those replications. Only two of them need be considered, Nos. 2 and 4.

Replication No 2 seeks to meet the plea of limitation by stating that the policy was made in the state of Virginia; that it was countersigned at Wheeling, W. Va., but not then completed by delivery, but was later delivered to Rice, an insurance broker of Richmond, Va., and by him delivered to Hutton, an insurance agent at Warrenton, Va., and was by him delivered to Galloway at Warrenton, and that it thus was a completed Virginia contract for insurance of property situated in Virginia, and to be performed in Virginia; and that the company was not a corporation created by Virginia; and that certain statutes of Virginia, specified, prohibited foreign corporations from doing business there without complying with certain regulations, one being the appointment of an agent upon whom process might be served, and that this the defendant had not done; and that, because there was no such agent, the plaintiff was prevented from suing within the six months. This replication would maintain that, the policy being a

contract made in Virginia, its statute law requiring the appointment of such agent became a part of the contract, as if inserted therein,—just as much a part of the policy as if it had in words said that the six months limitation should apply only “in case the company shall appoint, as required by the law of Virginia, an agent to accept service therein of process in actions against it.” This raises the question whether the policy is a Virginia or West Virginia contract, for, if not a Virginia contract, very plainly the Virginia statute cannot be an element in it. I think, for several reasons, it is a West Virginia contract. May, Ins. § 66, says: “It follows, from the rule that the contract is completed when the proposal of the one party has been accepted by the other, that the place of contract is the place of acceptance. If an agent, resident in one state, of an insurance company, resident in another, forwards the requisite papers to the home office, and a policy is issued, and mailed directly to the applicant, the contract is a contract made in the state where the home office is situated; and, since the acceptance is the term of completion, it would seem that a transmission of the policy by mail to the agent, to be delivered by him to the applicant, would have the like effect.” See 2 Pars. Cont., 582. And 3 Am. & Eng. Enc. Law, 551, says that the general rule is “the place of the contract of insurance is the place where it was accepted.” Tested by this law, when the proposal, if forwarded by an agent of the company, resident in Virginia, was accepted at the home office, and a policy issued and mailed to the agent in Virginia, to be delivered by him to the applicant, it would be a West Virginia contract, because the acceptance was there; but, to make this stronger, we may eliminate the consideration that the policy was sent to a Virginia agent of the company, to be delivered in Virginia to the insured party, as this replication does not aver that Rice or Hutton was agent of said company, and the policy has a clause declaring him not an agent of the company, and the policy is a part of the declaration; and thus we have simply the case of some one as plaintiff’s agent sending to the Wheeling home office an application, and its acceptance there, and the issuance there of a policy, and its delivery to the applicant’s agent

in Richmond, which, under above law, makes it a West Virginia contract. The place of acceptance, not delivery, decides where the contract is made, as a general rule. And, if delivery were important, a delivery to the mail, addressed to the applicant or his agent, would be the final delivery. 2 Pars. Cont., 582; *Hartford Steam-Boiler Inspection & Insurance Co., v. Lasher Stocking Co.*, (Vt.) 29 Atl., 629; 4 Am. & Eng. Enc. Law (2d Ed.) 202, note 1. Nothing more remained to be done to complete the contract. By delivery to the mail, the company, in effect, delivered it to a third party to be delivered to the insured, and lost control over it. An excellent discussion of this subject is that by Justice Clifford. *Desmazes v. Insurance Co.*, (U. S. Cir. Ct., Mass.) 7 Fed. Cas., 529. That it was completely signed and countersigned by the officers at Wheeling is recited in the policy. So it is, under the facts and law, a West Virginia contract. But, to make this plainer, it declares that it should "not be valid until countersigned by the duly-authorized agent of the company at Wheeling, W. Va." It shows that it was countersigned there. It then was completed and took effect. Judge Anderson, in *Insurance Co. v. Warwick*, 20 Grat., 628, says this shows it to be a contract where countersigned. The place of the performance of the final act, which is to give effect to the contract by its own word, is conclusive to show where the contract was made. A policy of insurance declared that the contract "shall not take effect until the first premium shall have been paid." It was held to be a Missouri contract, though signed by the company in New York, because the payment of premium was in Missouri. *Assurance Co. v. Clements*, 140 U. S., 226, (11 Sup. Ct. 822.) A policy issued by a company in New York, and there signed, but not to be valid until countersigned by an agent in Massachusetts, was held a Massachusetts contract. *Heebner v. Insurance Co.*, 10 Gray, 131. Same doctrine, 3 Am. & Eng. Enc. Law, (1st Ed.) 551. These principles are fully stated in *Ford v. Insurance Co.*, 99 Am. Dec., 663, 668. But if it were a Virginia policy, what then? The law requiring an agent's appointment would not be a part of it, because it is a law unto itself, prescribing its own limitation, and contains no exception based on failure to

appoint an agent. It is settled that where a contract fixes a shorter limitation than that of the general law, the exceptions in the general statute of limitations do not apply, because the rights of the parties are tested by the contract; and, as it relieves them from the general law, it relieves from its exceptions. *Wilkinson v. Insurance Co.*, 72 N. Y., 499; *McElroy v. Insurance Co.*, 48 Kan., 200, (29 Pac., 478); *Riddlesbarger v. Insurance Co.*, 7 Wall. 386; 2. May, Ins. § 483. And again, if a Virginia contract, and the statute a part of it, it seems to me that the statute could only apply to a suit in Virginia. What has it to do with a suit in West Virginia? If the policy had in words said that suit should be within six months, "unless the company fail to appoint an agent in Virginia," how could it affect a suit here? So I conclude that the Virginia statute has no relation to this suit, and replication 2, setting it up as an excuse for not sooner suing, sets up immaterial, irrelevant matter, and is no answer to the plea of contract limitation. The facts which it states make the policy a West Virginia policy, and exclude the introduction of the Virginia statute. As suit could be brought in West Virginia, what excuse is there for not suing here? If, however, we could say that replication shows a Virginia contract, it would be bad, because the declaration files the policy, which shows itself on its face to be a West Virginia contract, and the replication showing a Virginia contract would be in conflict with the declaration, and be a departure in pleading, and bad under the law of pleading forbidding departure. 6 Enc. Pl. & Prac., 460.

The policy does not say payment of loss was to be at any particular place. Therefore, it is to be where the policy issued. 3 Am. & Eng. Enc. Law, 446; 2 Pars. Cont., 583. It is urged that the debtor must seek and pay his creditor, and, as the insured party lived in Virginia, therefore it is a Virginia contract. I think this Court has in some opinion held that the duty of a debtor to seek his creditor to pay him does not call the debtor to go out of the State, and I find the law so stated in *King v. Finch*, 60 Ind., 423, and in *Littell v. Nichols' Adm'r*, Hardin, 66. But this does not seem to test the question of the place of the making of the contract. If a contract be made be-

tween parties, and the creditor should move to Maryland afterwards, would that make it a Maryland contract?

Replication 4: It states that the goods insured by the policy sued upon were also insured in the Wytheville Insurance & Banking Company and the Petersburg Saving & Insurance Company, and that, after the fire, agents of the three companies met, and sought to compromise the claims of plaintiff, and made an offer, which plaintiff rejected; and that afterwards, before the expiration of the six months, the defendant company promised him to pay him the full sum stipulated in the policy without suit, in case the Petersburg Company would pay him the full amount of its policy, on which promise he relied; and that the Petersburg Company did pay him the amount of its policy, but the defendant refused to pay the amount of its policy, and did not, until long after the expiration of said six months named in its policy as a contract limitation, refuse to pay or decline to do so, and did not notify him of any purpose not to pay. The circuit court rejected this replication, because it failed to show the date when the promise to pay ceased; that is, when the company notified plaintiff that it would not pay. This replication, as counsel for the company concedes, alleges that during the whole of the six months the company was promising to pay, and did not refuse to do so until after that period, and then did refuse. Then the position of the circuit court is not that the date of the refusal to pay must be given, so we may see if a part of the six months remained which would afford a reasonable time for suit before its expiration, as held in *Steel v. Insurance Co.*, 47 Fed., 863. But even if the whole six months had gone before a refusal to pay, the promise to pay would be no waiver of the limitation, but suit might be, and must be, brought within six months after refusal to pay, not later, and that the date of refusal should appear if suit was in six months thereafter. This depends upon whether the promise of payment is a waiver of the clause of limitation, eliminating it thereafter from the policy, and estopping the company from pleading it, or merely operates to suspend the running of time under it, so long as the promise lasts until refusal to comply with it. Now, whether such promise continuing unexecuted for a time,

and then ended by a refusal to perform it, leaving a part of the period reasonably sufficient for suit, would be a waiver of the clause, or merely suspend it from the promise to the refusal to fulfill it, I need not—do not—say. I do say, however, that where such promise stands for the whole period of the limitation, it is not a mere suspension, but a waiver of the clause of limitation. The mere pendency of negotiations for settlement is no waiver. *McFarland v. Insurance Co.*, 6 W. Va., 425. But a promise to pay ends controversy, and by it the company says: "You need not sue at all. I will pay without suit." It admits of no other interpretation. *Thompson v. Insurance Co.*, 136 U. S., 287, (10 Sup. Ct. 1019,) held that a promise to pay was a waiver, and barred the company from this defense. The court went further, saying that conduct of the company inspiring a hope and expectation on the part of the insured party that the loss would be amicably adjusted would operate as such waiver and estoppel. The court held it an estoppel against the plea, not a mere suspension. It said delay to sue would, in such case, be attributable to the company. It said the waiver need not be in writing. Assurances of settlement, which reasonably throw the insured party off his guard, and lull him into security, will waive the limitation clause, and bar its use by the insurance company. *Insurance Co. v. Peck*, 133 Ill., 220, (24 N. E. 538); *Bonnert v. Insurance Co.*, 129 Pa. St., 558, (18 Atl. 552); *Insurance Co. v. McGregor*, 63 Tex., 399; *Bish v. Insurance Co.*, 69 Iowa, 184, (28 N. W. 553); *Martin v. Insurance Co.*, 44 N. J. Law, 485; 2 May Ins. § 488; *Banking Co. v. Myer*, 93 Ill., 271, holds a promise to pay a waiver. We must remember that this clause is for the benefit of the company, inserted by it to limit the period for suit shorter than the general law, and it would be unjust to allow it by its action to cause delay in suit, and then plead this clause. Being for its benefit, it may waive it. In determining whether such promise of payment is a waiver or a mere suspension of running of time, we must reflect that the limitation clause is only a matter of contract, not like the statute of limitations. It either operates or is entirely gone by reason of waiver. The statutory limitation fixes a period as a bar, and then says

that when there is obstruction to the prosecution of the suit by absence or other cause the time of the obstruction does not count. The running of time stops for a time and then begins again,—opens and expands,—because the statute says so; but not so with the contractual limitation. *Semmes v. Insurance Co.*, 13 Wall., 158. But cases cited above treat the promise as a waiver of the clause, not a mere suspension.

After finishing this opinion, I meet with the case of *Insurance Co. v. Baker*, 153 Ill., 240, (38 N. E. 627), meeting the point squarely, holding that “hopes of payment held out to a plaintiff by an insurance company as an inducement not to sue within the time limited in the policy operate as a waiver of the limitation clause,” and that, “when once so waived, the clause will not, after any substantial part of the time is lost, be revived by a statement to the insured that the company is insolvent, and he can make nothing by suit,” and that “after such waiver the case rests upon the regular statutory limitation.” Of course, if a lapse of part of the six months would be a waiver, all of it would. The leaning of the opinion is that it is a waiver regardless of time.

It is proper that I should allude to cases cited in the circuit court's opinion to sustain the contention that such promise only a suspension of time. *Black v. Insurance Co.*, 31 Wis., 74, seems to hold it a suspension. *Steel v. Insurance Co.*, 47 Fed., 863, was where there were assurances of settlement for a time, but then repudiated, and seven months remained before the end of the period for suit, which the court held a reasonable time for suit. It admitted that, if all the time had gone, it would prevent the company from pleading the limitation. *Barnum v. Insurance Co.*, 97 N. Y., 188, not in point. There were proofs of loss, then negotiations as to amended proofs, and under all the cases the contract limitation could not start till proof or loss of time thereafter given for payment, and the court held that cause of action did not accrue until close of negotiations for amended proofs. It did not hold that promise of payment, after accrual of action, and within the period, would be a mere suspension. *Insurance Co. v. Fish*, 71 Ill., 621, does not decide this point. It decides

that, pending negotiations, suit need not be brought; thus sustaining the proposition that conduct indicating adjustment will be a waiver, rather than holding it a mere suspension. It cites *Insurance Co. v. Chestnut*, 50 Ill., 116, which holds that an adjustment and promise to pay would waive the limitation clause,—an authority to sustain me. And it cites a case in 25 Ill., 466 (*Insurance Co. v. Whitehill*), holding the same. So the 71 Ill., case is no authority on the point, and, if it were, is overborne by older and later Illinois decisions.

By reason of the rejection of replication 4, we reverse and remand for further proceedings.

Reverse.

CHARLESTON.

HARRIS v. ELLIOTT.

Submitted June 9, 1898—Decided November 19, 1898.

1. SPECIFIC PERFORMANCE—*Oral Contract—Evidence—Sale of Land.*

The evidence must be clear, full, and free from suspicion to enable a court of equity to enforce an oral contract for the sale of land. (p. 248).

2. RESULTING TRUST—*Title—Equity—Payment.*

To raise a resulting trust for one paying purchase money for land when title is taken in the name of another, the trust must arise from equity principles, at the moment title passes, and no subsequent payment will create it; nor will a subsequent agreement by the party holding title to hold in trust raise such trust. (p. 249).

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55	43

45	245
765	160

3. RESULTING TRUST—*In Loco Parentis*—*Loan*.

A resulting trust will not arise in favor of one paying for land conveyed to another, if that other be wife or son or other person as to whom the one paying voluntarily places himself in *loco parentis* in the transaction. A resulting trust will not arise in favor of one paying for land conveyed to another where such payment is only a loan to such other person. (pp. 249, 250).

4. RESULTING TRUST—*Subrogation*—*Lien*.

Where it appears clearly that, in paying for land by one with conveyance to another, the party paying intended to make a gift or confer a benefit, no resulting trust arises in his favor. To warrant subrogation in favor of one paying a debt as surety or otherwise, the debt paid must have been a lien on the land. (p. 250).

5. SUIT TO CHARGE LAND—*Fraudulent Purchaser*—*Decree*—*Costs*.

In a suit to charge land in the hands of a fraudulent purchaser with money, he yet holding the land, that must be subjected; and there cannot be a personal decree against him for the money, though there may be for costs, if the land does not pay the money and costs. If he has sold, he may be charged with the proceeds. (p. 250).

Appeal from Circuit Court, Barbour County.

Bill by Jasper W. Harris against James B. Elliott and Creed C. Harris. From the decree, defendants appeal and J. W. Harris cross-assigns error.

Reversed.

SAMUEL V. WOODS, for appellant.

DAYTON & DAYTON and FRED O. BLUE, for appellee.

BRANNON, PRESIDENT:

Jasper W. Harris filed a bill in equity in the Circuit Court of Barbour County against Creed C. Harris and James B. Elliott, alleging that Elliott had sold and conveyed to one Wolf a lot in Meadowville; that Wolf sold it to Jasper W. and Creed C. Harris, and as the deed from Elliott to Wolf had been lost, Wolf and Elliott joined in conveying it to Creed C. Harris, for their joint benefit, however; that they were to pay Wolf two hundred and five dollars for the lot, of which Jasper had paid ninety-five dollars, and they executed their two joint notes for part of the balance, except about five dollars. The ninety-five dollars was paid in a note of both Harrises under an arrange-

ment with Wolf to Knotts, which was later paid by Jasper. Jasper paid also thirty-eight dollars and forty-eight cents on this purchase-money debt. He paid, in all, it seems, one hundred and thirty-four dollars and seventy-six cents. Afterwards, Creed sold and conveyed to Elliott this lot, he paying for it by discharging a balance of purchase money yet due him under said Harris notes, and a note for store bill given him by Creed Harris, and some money. The bill charged that Elliott, when he took the conveyance from Creed Harris, knew that Jasper Harris was a joint owner with Creed Harris, and knew of the rights of Jasper under his payment of part of the purchase money. The bill also stated that some time after the conveyance to Creed Harris from Wolf and Elliott, under which Creed was in possession, Creed moved to Tucker County, agreeing with Jasper that, if he would pay the balance of purchase money due Elliott, he might have the property, and he (Creed) would convey to Jasper all his interest therein; that Creed surrendered possession to him, and that Elliott knew of this oral contract when he bought of Creed. The bill prayed that Elliott be held as trustee holding legal title for the plaintiff, and that he be either required to convey to plaintiff, or that the lot be sold, and out of its proceeds he be repaid what he had so paid. A decree was pronounced, denying right to the plaintiff to have a conveyance of the lot itself from Elliott; but a later decree declared that a trust existed in favor of Jasper W. Harris for one hundred and eighty-three dollars and twelve cents, to repay him what he had paid and subjecting the lot to sale therefor, and decreeing the same as a personal decree against Creed C. Harris and Elliott. Jasper W. Harris cross-assigns as error against him the decision of the circuit court that he was not entitled to a conveyance of the lot itself. The theory of the bill is that the purchase of the lot was by the two Harrises jointly. It is a strong circumstance against this theory that the deed was made to Creed alone, especially as it is proven that, when Wolf, Elliott, and the two Harrises were arranging for the execution of the deed, Jasper distinctly directed the deed to be made to Creed, and said he did not want the property, had no use for it; that Creed wanted it, and he

wanted to help him, as it would make a good home for him; and that Creed had been with him a long time, and had been a good boy; that, if Creed ever got able to pay it back, it would be all right, and, if he should not, it would be all all right. This is a reasonable probability. Jasper was a man of fifty-three, of some means; Creed about twenty-one, his nephew, very poor, with a family, who had made his home at Jasper's from the age of fourteen years, and did a good deal of work for him. Other circumstances, not necessary for detail here, negative this ground for relief. Indeed Jasper himself, as a witness, when asked whether he claimed the lot under the purchase from Wolf, or under an oral contract with Creed, answered that he claimed it under the oral contract; and, further, his counsel lay their argument alone on that oral contract for a conveyance of the property.

Next, as to that oral contract: Jasper says that, some time after the deed to Creed, Creed moved from the lot to Tucker County, telling Jasper to pay the purchase money and take the property, and he would convey it to him. He never paid it all, which tends to negative this contract. But Creed denies this contract, and the proof is short and unconvincing upon it. Courts, with the statute requiring writings for contracts of sale of real estate staring them in the face, should be very slow to apply that principle, which is nothing but a judicial nullification of that statute, known as "part performance." And courts are slow to do so. If I could, I would abolish, by legislation, the doctrine of part performance, as productive of more harm, from fraud and perjury and engendering of litigation, than benefit, from its defeating fraud. Modern English judges regret its introduction into equity law. Some of our states reject it. At any rate, courts should, and do, require proof full and above suspicion before applying it. The circuit court, upon conflicting evidence, found against the plaintiff as to this claim for relief, and we cannot reverse for this cause.

Next, as to the theory expressed by the circuit court as the basis for its decree; that is, that a resulting trust exists in favor of Jasper W. Harris, not for the lot itself, but for repayment of money paid by him "into the property,"

"creating lien upon it:" There is no evidence to show that Creed Harris took title upon the trust to pay out of it this money, and therefore there is no express trust for its repayment. The theory of the circuit court does not claim this. Whether one could create a lien on land by taking title on promise to pay money to another is a question not necessary to answer. If a grantor were to convey upon such trust, likely so; but not where a borrower or debtor so promises. 2 Am. Dig. Eq., 522. The payment of the purchase money by a stranger, and title taken in the name of another, raises a trust called a "resulting" or "constructive" trust in equity in favor of that stranger, either *in toto* or *pro tanto*, according as he paid for the land in whole or in part. *Deck v. Tabler*, 41 W. Va., 332, (23 S. E. 721); *Currence v. Ward*, 43 W. Va., 368, (27 S. E. 329). But this trust is for all or part of the very land itself, not a lien for the money. *Shaffer v. Fetty*, 30 W. Va., 348, (4 S. E. 278). Another reason against such resulting trust is that what money Jasper paid he paid after the deed to Creed; as it is a rule that the payment which is to raise a resulting trust must be made at the very instant the title is taken by the alleged trustee, as no subsequent payment, or even oral agreement for such trust, will raise it. No subsequent application of the money of the third person to the payment of the purchase will create such trust. *Smith v. Turley*, 32 W. Va., 14, (9 S. E. 46); 1 Perry, Trusts, §§ 126, 133. Another fact against this trust is that, as above stated, Jasper declared, when the deed to Creed was agreed upon, that it was to be made to Creed, and he (Jasper) would help him to pay for the land, as Creed had lived at his home, and had been a good boy, and, if he ever got able, he could pay it back, and, if not, it would be all right. Creed had come to Jasper's house when a small boy, and lived with and worked for the latter, and Jasper was as a parent, being his uncle. When one pays for land, and the title is made to a stranger, the presumption is that he who paid intended to own; but if the person invested with title is a wife, son, or near relative, or one to whom the purchaser has placed himself *in loco parentis*, there is no resulting trust. Creed was but a nephew to Jasper, and I concede that such relationship

would not alone repel a trust, as would that of a wife or child; but it is the particular circumstances of this case that make such relationship negative a trust, as Jasper's having largely raised Creed, and his declarations and his directing the deed to be made to Creed, without any other explanation of not himself taking an interest by the deed, and his declaration that he did not need the land, but wanted it for a home for Creed, show that he placed himself in the place of parent to Creed, and intended to confer a benefit, not to create a trust for himself. All the circumstances in law repel a trust, since a trust, being based on a mere presumption that the one paying for property intended to own it, may be repelled by circumstances showing a contrary intent. 1 Perry, Trusts, §§ 139, 140, 144; *Deck v. Tabler*, 41 W. Va., 332, (23 S. E. 721). When once it appears, as it does clearly in this case, that no resulting trust was intended at the time, but that a benefit for a relative was designed, the party cannot afterwards recant his generosity and plead a trust; for, even if the donee were afterwards to admit such trust,—nay, admit it in writing,—a court would not enforce, without fresh consideration of value. 1 Perry, Trusts, § 140. Say that Jasper intended a loan; then he must treat his payment as a personal loan. It is no trust in law. 1 Perry, Trusts, § 133. I have called this payment a gift to help a needy, poor relative. If Jasper did not owe Creed, we can fairly treat it so. But the truth is Jasper owed Creed for work, as the evidence shows; and, if so, Jasper was only paying a debt, not raising a trust. Many circumstances repel a trust. It must not be thought that Jasper can get relief on the idea of subrogation, as having paid purchase money under joint notes given by him and Creed, for no lien was retained therefor. Subrogation only places the party paying in the shoes of the creditor,—gives him the creditor's rights; but if there is no lien, there is no subrogation. I cannot find any warrant for the decree.

The decree is erroneous for another reason. It is a personal decree against Creed Harris and Elliott for the money paid by Jasper Harris. If even Elliott acquired the property from Creed in fraud of Jasper's rights, Jasper could look to nothing but that on which his claim

rested,—the property. You could subject that, and Elliott could relieve it by payment; but you must give him right to elect to yield the property instead of paying, and not put a debt on him he never agreed to pay. Had he sold the property, and pocketed its proceeds, you could follow the proceed to his pockets, not otherwise. *Shoe Co. v. Haught*, 41 W. Va., 275, (23 S. E. 553); *Ringold v. Suiter*, 35 W. Va., 186, (13 S. E. 46); *Hinton v. Ellis*, 27 W. Va., 422.

Reversed and Bill Dismissed.

CHARLESTON.

LAUCK *et al.* v. LOGAN.

Submitted June 17, 1898—Decided November 23, 1898.

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51 258

1. DEED—*Will—Construction of Writing—Death of Maker.*

The rule of construction for determining whether an instrument is a will or testamentary paper or a deed is that, if it passes a present interest, though the right to possession or enjoyment does not accrue till the death of the maker, it is a deed or contract, but, if it does not pass any interest or title whatever till his death, it is a will or testamentary paper, not a valid deed or contract. Section 5, chapter 71, Code 1891, does not change this rule. (p. 253).

2. DEED—*Will—Construction of Writing—Intention of Maker.*

In determining whether an instrument is testamentary or deed or contract, courts do not allow language peculiar to either class of instrument, nor even the belief of the maker as to the character of the instrument, nor the name he gives it, to control inflexibly its construction; but, giving due weight to these circum-

stances, courts look further, and, weighing all the circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention of its maker. (p. 253).

3. *DEED—Delivery of Deed—Vested Remainder.*

An instrument in form and name a deed of conveyance, acknowledged as such, and delivered to the grantee, whereby, for consideration of five dollars and love and affection, the grantors "do grant with general warranty" a tract of land closing with the clause, "But it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner," is a valid deed, not a testamentary paper, and confers a vested remainder on the grantee, to come into enjoyment on William Logan's death. (p. 255).

4. *LIVERY OF SEISIN.*

Section 1, chapter 116, Code Va. 1849, taking effect 1st of July, 1850, abolished livery of seisin. (p. 260).

Appeal from Circuit Court, Wood County.

Bill by Sarah E. Lauck and Laura L. Downing against L. N. Logan and others. From the decrec, Logan appeals.
Reversed.

VAN WINKLE & AMBLER and GEORGE W. NEAL, for appellant.

HARRY P. CAMDEN and W. N. MILLER, for appellees.

BRANNON, PRESIDENT:

William Logan and wife made a deed by which they conveyed to L. N. Logan certain real estate in Parkersburg in consideration of five dollars paid, and love and affection. The granting part of the deed is, "Do grant, with general warranty, the property described," &c. At the close is the clause, "But it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner." This writing was signed, acknowledged and delivered to L. N. Logan at its date. William Logan died, and the deed was put on record a few days after his death. Later, Sarah E. Lauck and Laura L. Downing brought suit in chancery against L. N. Logan to annul said deed, which resulted in a decree annulling it, from which L. N. Logan appeals. All said parties are

children of William Logan. The plaintiffs rested their bill on three grounds, namely, the incompetency of William Logan to make the conveyance, undue influence used to induce him to make it, and invalidity of the conveyance itself. There is no basis under the evidence to sustain the charges of incompetency and undue influence. Indeed, virtually, they were not relied upon in argument. The sole question is the validity of the deed. It is claimed by plaintiffs that it is neither a deed nor a will effectual to convey the property; that it is not a deed valid to pass property, because it conveys no present estate, vests no title in the grantee *in præsenti* (at present), but vests it *in futuro* (in future), and therefore is not a deed passing estate, but is testamentary in character, operating, like a will, to vest estate only at the death of its grantor; and that it is not a will because not shown to have been wholly written by Logan, or executed with witnesses, as required by law to make it a good will. I will remark that it is no objection that a deed vests estate *in futuro*, for that a deed may now do under our statute law; but the objection made against this deed is that it vests title only at the death of William Logan, and is thus not an act of alienation operative between living persons (*inter vivos*). In *Roberts v. Coleman*, 37 W. Va., 143, (16 S. E. 482), this Court held that "an instrument transferring property intended to operate only after the death of its maker is testamentary in character, and cannot operate as an instrument *inter vivos*." Further examination upon the subject made by me in this case, and the able brief of appellees' counsel, confirm me in the opinion that the said statement of law is borne out by the decided weight of authority in many well-considered cases. I may safely say under them that, if a writing passes a present interest, though the right to its possession and enjoyment may not accrue till grantor's death, it is a good deed or contract; but, if it does not pass an interest or right till the death of the maker, it is a will or testamentary paper, and not good as a deed or contract. No matter that the paper is in name or form a deed, a bond, a note, or an agreement, if it is to pass title only at death, and vest no manner of estate till then, it is not a deed, bond, note or agreement, but a will or testamentary paper;

no matter what its maker called the paper, or believed it to be. What does it say? What is its effect in law? That is the question. The intention of the maker as to the character of the estate conveyed is the criterion by which the court determines whether it is a deed or will, and, if the intention gathered from the whole paper is that no estate is to pass until his death, it is a will, not a deed. It may confer a present vested estate, though the right of possession and enjoyment under it may be in the future, and it is a good deed, but if it vests no estate whatever till death it is a will. 29 Am. & Eng. Enc. Law, 145, 149; *Burlington University v. Barrett*, 92 Am. Dec., 376, note, 383; *McBride v. McBride*, 26 Grat., 476; *Hazleton v. Reed* (Kan. Sup.) 26 Pac., 450; *Turner v. Scott*, 51 Pa. St., 126; *Deiz's Case*, 50 N. Y., 88; *Brewer v. Baxter*, 5 Am. Rep., 530; *Watkins v. Dean*, 31 Am. Dec., 583; *Babb v. Harrison*, 70 Am. Dec., 203; *Carey v. Dennis*, 13 Md., 1. The eminent Judge Baldwin said in *Pollock v. Glassell*, 2 Grat., 457: "The very reason which prevents this assignment from taking effect as a deed requires that it should be treated as a will. A deed is an instrument which must operate *inter vivos*, and here the instrument cannot operate in that way, it having no legal effect till the death of the party by whom it was executed." The theory upon which this doctrine seems to rest is that the paper does just what a will does,—that is, it gives the property at the death of the maker, a thing which the law says can only be done by a will; and therefore, if of any effect, it is as a will, not as a paper operative between living people. The law says that property can be passed by the act of the parties only by deed or will, and when a paper is a will it is not a deed. That is the sole reason for denying its effect as a deed. If it were an open question, I would say that the law ought to give a paper not so executed as to be good as a will effect as a deed, if good as a deed, and a paper executed so as not to be good as a deed effect as a will, if good as a will. If A. grant land to B., reserving a life estate, all agree that the deed is valid, because it instantly passes a vested estate to B. in remainder, only postponing its possession and enjoyment till the death of A. *Hurst v. Hurst*, 7. W. Va., 289; *Trawick v. Davis*, 85 Ala., 342, (5 South, 83); and

yet if A. "doth grant a certain tract of land to B. at A.'s death," it would be no deed, because passing no title or estate till A's death. How technical the difference! How unsubstantial! In both the grantor means the same thing,—that is, to reserve the possession and enjoyment in himself during life, and then give them over to B.,—and his intent ought to prevail. If a man make a deed, and deliver it to another in escrow, to be delivered to the grantee after the death of the grantor, it is a good deed, though we know that a deed is ineffective without delivery. The courts struggle to make the act execute the intent. *Lang v. Smith*, 37 W. Va., 734, (17 S. E. 213); *Davis v. Ellis*, 39 W. Va., 230, (19 S. E. 399). But the rule stated above, though seeming to me to be unreasonable, is entrenched behind many decisions through many years, and we cannot repeal it, especially as it is a rule of property, not a mere rule of court practice. But, as it defeats intention, it should be applied only in the plainest cases. Such is the general rule. Its application is often difficult. Each instrument must stand on its own feet, be judged by its language and circumstances. In the first place, in the construction of both deeds and wills we must seek the intent of their makers; and in doing so the whole paper, and all its parts, must be considered together. *Hurst v. Hurst*, 7 W. Va., 289, 339, "In determining whether the paper is testament or deed or contract, courts do not allow the use of language peculiar to either class of instruments, nor even the belief of the maker as to the character of the instrument, to control inflexibly the construction; but, giving due weight to these circumstances, courts look further, and, weighing all the language as well as facts and circumstances surrounding the parties attending the execution of the instrument, give it such construction as will effectuate the manifest intention of the maker." *Burlington University v. Barrett*, 92 Am. Dec., 376.

Now, let us look into the deed before us. Without the closing clause it is perfectly clear that this deed vests a present fee-simple estate by the words "do grant" in the present tense, importing in grammar, as well as daily language, present, actual transfer. We must give these words, found in the very heart of the deed,—in its grant-

ing clause,—their natural force. The closing clause, however, must not be forgotten. Shall it destroy the plain import of the words “do grant?” Or shall we rather say that it means only to postpone the actual possession and use of the property till William Logan’s death? Is not this a construction giving these different parts of the deed due weight? Who shall say, or who can reasonably say, that it does not speak the real purpose of the parties? Did not William Logan intend to vest the property finally and actually, and beyond his recall, in L. N. Logan, only reserving to himself a life estate? The use of the word “full” strengthens this view, implying that the mind realized that the deed had present partial effect; yet it was not intended to have full, complete, final effect until the grantor’s death,—that is the property was to be the grantee’s, but not to come to his hands, but remain in the grantor’s hands, until the grantor’s death. The deed does not say, “do grant to L. N. Logan at the death of William Logan,” but the granting clause is absolute, and the reservation of what I say was intended to be only the reservation of a life estate is a later and independent clause. We have words of present grant. They are not without force, and are not to be paralyzed by the closing clause, when we can assign to it a reasonable function, and give each clause its fair relative meaning, when laid by the side of the other clause. These words were considered potential in *Wall v. Wall*, 64 Am. Dec., 151. Do you think that William Logan intended that this paper should be ambulatory, vesting no right in his son, but subject to his own revocation? He inserted no clause of revocability. He does not hint of such a purpose, and he grants with general warranty. That does not comport with the idea of a power of revocation in him. People do not put warranty in wills. They do so in deeds of present grant. The deed was executed by both husband and wife. Such is not the case with wills. The paper does not dispose of all Logan’s property, for by an exactly similar deed he conveyed on the same day to a daughter, Mrs. Broughton, other valuable property. If he intended to do a testamentary act, why did he not make one will cover both properties? The answer is that he intended by these deeds, as

deeds, to give finally to these children the properties irrevocably, reserving to himself a life estate. He had a lawyer to draw the papers. Why did he not draw a will, if he intended a will? He was instructed to draw deeds, and not a will. And then, again, William Logan did not keep this paper in his own possession, as men do with wills because they have no operation until death; but he delivered them on their very date, because he intended them to operate at once, as men do with deeds; he intended to give his son and daughter muniment and evidence of irrevocable title. He acknowledged the deed before a notary for recordation. Men do not so acknowledge wills. William Logan did each and everything which he could do, or was required by law to do, to make the deed effectual as a deed; and when that deed contains language and form and cast operating as and for a deed, and not a will, why shall we not accord it force as a deed? There is one thing that is very certain, and that is that this construction carries out the true intent of William Logan, and enables a man competent to do the act, and free from undue influence, to do what he pleases with his property, or some of it. Why he chose to give it to these two children we do not know; but, as he was competent, this Court cannot inquire into the reasonableness or justice of his act. *Hale v. Cole*, 31 W. Va., 576 (8 S. E. 516). We hold the deed valid.

Reference was made to our decision in *Ward v. Ward*, 43 W. Va., 1, (26 S. E. 542), as ignoring the rule that a paper vesting estate at death is not a deed, but testamentary. By no means does it do so. The point was not raised or considered. The deed was conceded to be a valid deed. The point could not arise, because the deed reserved plainly a life estate to grantor, and conferred a remainder on grantee, which all authorities hold good.

I know that some of the cases cited above for the rule stated would overthrow this deed, but others would not. *Wilson v. Carrico*, 40 Ind., 533, held a deed saying, "to be of no effect until after death of grantors, and then to be in force," valid as a deed, not testamentary. Deed in *Shackleton v. Sebrce*, 86 Ill., 616, read "This deed not to take effect until after my decease,—not to be recorded till after my decease." Held a valid deed. So held in

Owen v. Williams, 114 Ind., 179, (15 N. E. 678), of a deed granting "after my death and not before." Deed conveyed "premises to have and hold to him at said grantor's and grantor's wife's death." Held valid deed, not a will. *Goff v. Davenport* 96 Ga., 423, (23 S. E. 395). So, in *Wyman v. Brown*, 50 Me., 139, a deed "not to take effect during my lifetime, and to take effect and be in force from and after my death." Likewise, *Abbott v. Holway*, 72 Me., 298, a deed "not to take effect and operate as a conveyance till my decease." So a deed, "at my death to have and hold." *Chancellor v. Windham*, 1 Rich. Law, 161. So, *Jenkins v. Adcock*, (Tex. Civ. App.) 27 S. W. 21; *Carpenter v. Hannig*, (Tex. Civ. App.) 34 S. W., 774. Since reaching this point in this opinion, I conclude there are as many, if not more, cases pointedly sustaining as those pointedly overthrowing this deed. So, reputable cases vindicate our holding, and in the conflict of authority why should we not make this instrument carry out its maker's intent, rather than make it perish? How should we decide if in doubt?

Counsel argue that, even if this deed were void tested by common-law principles, yet certain statutory provisions so change the common law as to make it valid. They refer to Code 1891, c. 71, s. 5, saying, "Any estate may be made to commence *in futuro* by deed in like manner as by will, and any estate which would be good as an executory devise or bequest shall be good, if created by deed." I cannot see that this operates to repeal the rule above stated that a paper which confers no estate till the death of its maker is inoperative, unless good as a will. After the Norman conquest, land could not be transferred at all by acts of the parties. Then came a statute allowing its transfer by feoffment with livery of seisin,—that is, actual delivery of possession. As the right of transfer existed only under statute, there could be none except by feoffment. Delivery of possession being necessary to manifest the transfer, there could be none where an estate to begin *in futuro* was to be created, and hence no estate in land to begin in future could be created. Another reason was that a freehold could not be in abeyance. The fiction was gotten up that where a particular estate, one for

years or life, with a remainder in fee thereafter, was created, this particular estate would support the remainder, and delivery of possession to the tenant of that immediate estate would answer for the remainder. Hence the rule that a future estate must have a particular estate to rest upon. This continued the law in Virginia till chapter 99, section 28, Code 1819, as to feoffments. But when the statute allowing a man to make a will of lands was passed, a future estate could, by will, be created without a particular estate, and without livery. So, also, under the statute of uses, by those particular conveyances good under it, a future estate could be made without livery. Code 1819, c. 99, section 29. But the common-law feoffment must be accompanied by livery. Even after the act of 1785, saying that no estate of more than five years should be declared except by deed, livery continued necessary, as it simply required that conveyance "be declared," not made by deed. The act, too, provided that livery of seisin, where that was required, should be in writing and recorded, showing that where the old law required livery it must still be made. It was required in common-law conveyance, feoffment, but not in devises or instruments good under the statute of uses. But our Code of 1819 partially abolished livery of seisin in saying an estate might be made to commence *in futuro* as well by deed as by will. It abolished livery as to future estates, not present ones. So I think a mere grant, which before this act, was only proper to grant estate in incorporeal property, became effectual to convey the land itself, and without livery. Grants always were required to be by deed, which passed title; feoffments were by word and livery only until the statute requiring them to be declared by deed. This deed did not vest title, but only attested what the livery did. That passed title. Tied. Real Prop., § 771. Now, the only purpose of this act was to get rid of livery of seisin, which prevented creation of future estates. It was not intended to abolish wills, nor the necessity of a will for an act of transfer requiring a will, that is a vesting of an estate upon the death of its creator. The objection to a "will deed" is, not that it creates a future estate, but that it gives estate at death, which requires a will. If

this statute so operated, there would scarcely be use for wills, and any instrument passing estate only at death would be valid, and all the decisions holding "deed wills"—that is, deeds vesting estate at death of grantor—void would be no longer in force. It has not been so construed. Certainly not in Virginia.

I may remark, though not important in the case, that livery of seisin was abolished by Code 1819, c. 99, s. 28, only partly,—that is, as to freehold estates commencing *in futuro*; or, rather, we cannot say abolished, as livery was never applied to future estates, but prevented their creation; and therefore it is more accurate to simply say that that act allowed, for the first time, the creation by deed of estates to begin *in futuro*. It left standing livery of seisin where it had always stood, necessary in the creation of freeholds commencing at once. This appears from the fact that the same act which allows in section 28 the creation of a future estate, still continues in section 3 livery of seisin where it had been always required in immediate estates. And even the statute cited as wiping out livery (Code 1849, c. 116, s. 4), going into force July 1, 1850, did not abolish it, and only rendered it needless, because it says, "All real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery," contemplating both as still operative. It does not say "lie in grant" only, or "in grant and not in livery." And this confirms my view that the Code of 1819, in allowing future estates, left livery standing as to creation of immediate estates, because the section quoted from the Code of 1849 says, "as regards the conveyance of the immediate freehold," thus limiting it to conveyance of the immediate freehold, and showing that the legislature considered livery as yet applicable to them, and designed to dispense with the necessity of its presence as to them. But, while that section did not abolish livery, and only allowed a grant for the immediate corporeal freehold, and thus enlarged the common-law effect of a grant before used only for incorporeal property, I think that section 1, chapter 116, Code 1849, saying that no greater estate than five years should be conveyed except by deed or will, did abolish livery. Thus, a grant of land without livery,

prior to July 1, 1850, would not be good (unless under statute of uses); but it would be good after that date. Before that date it must be "declared" by deed, or it would not be good, even with livery; but if it were so declared by deed, livery was till then essential. Since then livery without deed is not good. I think, however, that such grant before July 1, 1850, based on good consideration, would have been good under the statute of uses as a covenant to stand seised to use, without livery, and a grant for valuable consideration good as a bargain and sale, under that statute. But a voluntary conveyance without livery would not have been good. Thus livery of seisin is unavailing since that date; and a deed of grant itself, without livery, passes the freehold, as Code 1849, s. 1, in saying no greater estate than five years shall be passed but by deed or will, impliedly says it may be passed by deed or will; and section 4 says, "All real estate as regards the immediate freehold shall lie in grant as well as in livery;" and section 5 says, "Any interest in or claim to real estate may be disposed of by deed or will;" and chapter 117, section 2, says that the form of grant of land given by that chapter shall convey all the grantor's "estate, right, title, and interest." The West Virginia Code contains those provisions in chapter 71, sections 1, 4, 5, and chapter 72, section 2. The provision in Code, chapter 71, section 5, that "any estate which would be good as an executory devise or bequest shall be good if created by deed," only intends to enable what is in quality an executory devise to be made by deed, giving the same force to a deed to create executory interests as a will. By the use of the word "and" after the clause enabling an estate *in futuro* to be created by deed, this clause as to executory devise may be only to make more clear the capacity of a deed to create a future estate,—place it beyond question by mere expansion of language,—but its office seems to be to do by deed what could before only be done by will. Certainly, we cannot say it abolishes the rule that a deed passing no shadow of title to land till the grantor's death shall be repealed. Briefs of able counsel and oral argument have introduced these statute provisions into this case, and I would be wanting in deference if I had not discussed

the subject, though I must, with entire respect to counsel, say that I do not see that they are relevant. Decree reversed, and bill dismissed.

Reversed.

CHARLESTON.

RITZ v. CITY OF WHEELING.

Submitted June 6, 1898—Decided November 23, 1898.

45	262
48	610

45	262
150	458
50	461
50	468

45	262
64	177

1. VERDICT—*Directing Verdict—Evidence—Excluding Evidence.*

When, upon the facts conceded as shown, a verdict for the plaintiff would be against law, the court should, on motion, exclude the plaintiff's evidence, and direct a verdict for the defendant. So it is also where, if the essential facts claimed to be proven by the evidence were proven, a verdict for plaintiff would be justified by the law, yet the evidence does not appreciably tend to prove them, but so plainly fails to do so that two reasonable men should not differ as to its insufficiency. (p. 263).

2. NEGLIGENCE—*Trespasser—Injury to Trespasser.*

A landowner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is a child does not raise a duty where none otherwise exists. Such a trespasser, injured on such premises, cannot recover of the landowner by reason of the unsafe condition of the premises, unless this negligence be so gross as to amount to a wanton injury. *Frost v. Eastern R. R.*, 64 N. H., 220, (9 Atl., 790). (p. 264).

Error to Circuit Court, Ohio County.

Action by John S. Ritz against the City of Wheeling.
Judgment for defendant, and plaintiff appeals.

Affirmed.

CALDWELL & CALDWELL, for plaintiff in error.

HENRY M. RUSSELL, FRANK W. NESBITT, and S. O. BOYCE, for defendant in error.

BRANNON, PRESIDENT:

Sarah Ritz, a child of less than five years, was drowned in a reservoir maintained by the City of Wheeling to furnish water for public use, and the administrator brought action against the city, and upon the trial the court excluded the whole of the plaintiff's evidence from the jury as insufficient to warrant a verdict, and directed the jury to find for the defendant, and upon such a verdict gave judgment for defendant, and the plaintiff appeals. The case is not one involving credibility of witnesses, or weight of evidence, or the proper inferences and deductions from evidence, which are matters proper for the consideration of a jury; for the material facts of the case are undisputed, and the case presents simply the question of law whether, upon the facts, a liability rests on the city. The question is, was the city guilty of negligence? Negligence is, most frequently, a question of mixed law and fact, proper to go before a jury; but, where the facts are such that ordinary men will not differ about their effect in not showing negligence, it becomes a question of law for the court, not one of fact for the jury, and, if the evidence is not colorably sufficient to show negligence, the court ought to take the case from the jury and direct a verdict against the plaintiff. When the evidence is so clearly deficient as to give no support to a verdict for plaintiff, if rendered, the evidence should be excluded from the jury. *Klinkler v. Iron Co.*, 43 W. Va., 219, (27 S. E. 237); 1 Sherm. & R. Neg. (2d Ed.) § 56. Where the case turns on the weight and effect of the evidence in proving or not proving facts necessary to support the action, and the evidence appreciably goes to prove such facts, it ought to go to the jury, as a verdict upon such evidence gives it a force which it might not have with the judge before verdict, and fortifies the case more against the action of the court, as the court cannot set the verdict aside unless plainly and decidedly contrary to or without evidence; but where the

case is not such, but one of undisputed or indisputable facts, leaving it only a matter of law whether the facts show a liability on the defendant, the court should take the case from the jury, and direct a verdict, if the evidence shows no case for the plaintiff, because, if there were a verdict for him, it would be a finding against law, and the court always annuls a verdict against law upon conceded or indisputable facts. It is different then from a motion for a new trial, where the verdict rests on the credibility of witnesses or the weight and effect of evidence. *Grayson's Case*, 6 Grat., 712; *Poling v. Railroad Co.*, 38 W. Va., 645, (18 S. E. 772), (Syl. point 8). Likely this distinction is not always thought of. Plainly, if the court does right in excluding the evidence, it commits no error in directing a verdict, as such a verdict is the inevitable consequence of such exclusion. There cannot then be any different verdict.

Let us see, then, whether the city is liable. In maintaining the reservoir, the city was engaged in a lawful act, within its power and duty as a municipal corporation,—a governmental act; and I do not see, in the absence of a statute imposing liability, if an open question, how it could be held liable, even if guilty of negligence, under the principle stated in *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va., 299, (12 S. E. 707), and 1 Beach, Pub. Corp. § 749: "Where a city, under authority of a general law, undertakes a work for the sole use and benefit of the public, it is not liable for an injury caused by the negligent or defective act of its servants, unless some statute, either directly or by implication, gives a private remedy. This rule has been applied against a traveler injured by negligent blasting while excavating the foundation of a public school house, and against a child injured by reason of an unsafe staircase of a school house, and a dangerous excavation in a schoolhouse yard. The same rule has been applied in favor of cities in respect to town houses and court houses, and public grounds, like Boston Common. And it makes no difference, in the application of the rule, whether the injury is caused by a negligent act done in the direct performance of the public work, or is received after the completion of the work." You cannot sue the state

for such cause, unless it granted remedy. Why sue a city when performing a governmental function? One citizen is as much guilty of negligence as are others; all are guilty alike. Contrary doctrine holds a city liable as if an individual engaged in private work for private ends. But most authorities oppose this view. The law seems to be that a city or town, in the use of its property, though for purely public purposes, is liable for negligence as private owners. *Gibson v. City of Huntington*, 38 W. Va., 177, (18 S. E. 447); 2 Dill. Mun. Corp. § 985; 15 Am. & Eng. Enc. Law, 1141, 1149, 1155. But those authorities hold that, to make a municipal corporation liable for injury received from its use of its property, negligence must be shown. Thus we encounter in this case the question whether the city was guilty of negligence to which we can attribute the death of the little girl. There can be no negligence charged upon a person unless he rests under a duty to the person complaining of damage at his hands; for if there is no duty violated, though there may be grave damage befalling the complaining party, he has no ground of action. It is a case denominated in law as "*damnum absque injuria*,"—damage done, but without violation of a right in the injured party; a misfortune unaccompanied by a breach of duty by the party inflicting the injury. Sherm. & R. Neg. § 8. The reservoir and the land containing it were the private property of the city, used, not as a park or place of public resort or common, but only for reservoir purposes. The child was a trespasser, if you can say a child can be a trespasser. It was a trespasser, in legal sense; that is, it was on this property without right. The city was not bound to watch it. It could not be liable to it only for wilful or wanton injury. I would, as an original question, hold that the law testing this case is laid down in 1 Beach, Pub. Corp. § 754, as follows: "A municipal corporation is not liable to a trespasser who goes, without license or invitation, upon its land, though unmolested, for mere pleasure or to gratify curiosity, and there meets with an injury through the corporation's negligent management of its property; and no distinction is made in favor of an infant child so receiving an injury. In such a case the municipality owes no special duty to a child straying from its par-

ents, and the duty of protecting it is not shifted from its parents to the municipality because it chanced to escape from their care. This is the general rule applicable to those who trespass on private lands, and there is no reason why municipal corporations should not have the benefit of it; but, of course, it has no application to highways, where all have a right to be."

I repeat, this is so, because no legal duty rests on the corporation. Our own cases sustain the doctrine of immunity where there is no duty placed by the law upon the party sought to be charged with damages. By reason of this doctrine, the case of *Woolwine's Adm'r v. Railway Co.*, 36 W. Va., 329, (15 S. E. 81), denied relief to a man who visited a telegraph office kept by a railroad company to make a call of friendship on the operator, and was injured by negligence of the railroad's servants. And by reason of this doctrine, in *Poling v. Railroad Co.*, 38 W. Va., 645, (18 S. E. 782), no damages were conceded for the death of a person standing on the railroad grounds, and killed by reason of a defective apparatus used to catch mail from a passing train. And by reason of the same doctrine, in *Dicken v. Coal Co.*, 41 W. Va., 511, (23 S. E. 582), recovery was denied for the injury of a little child crippled by a car while on a tram road of a salt company. Such must be the ruling as long as private ownership in property is recognized, as to hold otherwise would detract from the lawful dominion of a man over his own property, and contravene the canon of property expressed in the *Dicken Case*, that "a party who is using his own property in a lawful way cannot be guilty of a breach of duty to any one."

These cases of our own decide the case against the plaintiff, but the importance of the case and briefs of counsel justify reference to other states. In *Clark v. Manchester*, 62 N. H., 577, a child of four years was drowned in a reservoir which had once been used by a city, but its use had ceased, the fence was removed, it was partly filled up, and but a portion yet had water in it. Children played there. A field was near by where ball playing and other amusements went on. The child, while passing along a path at the reservoir fell into it. It was held that the city was not, without a statute, liable for neglect of a public corporate

duty, and that the city owed no duty to one going upon its land for pleasure or curiosity, unless the negligence be so gross as to amount to a wanton infliction of injury, and that no distinction is made in favor of an infant. In *Grindley v. McKechnie*, 163 Mass., 494, (40 N. E. 764), a city kept a sewer, and by it a hole had been formed by the action of the water, and was filled with water, the hole being fifty feet from the street, along which was a fence, and some boards had been torn from it, and a path led from this opening to the sewer. A child went through this opening, along the path, to the sewer, and was drowned. It was held that the city owed no duty to the child to keep the sewer or hole in safe condition, and was not liable in damages. Similar decisions, based on principles above stated, are to be found in *Murphy v. City of Brooklyn*, 118 N. Y., 675, (23 N. E. 887); *Gillespie v. McGowan*, 100 Pa. St., 441; *Benson v. Traction Co.*, 77 Md., 535, (26 Atl., 973); *Charlebois v. Railroad Co.*, 91 Mich., 59, (51 N. W. 812); *Moran v. Pullman Palace-Car Co.*, (Mo. Sup.) 36 S. W. 659; *Overholt, v. Vieths*, 93 Mo., 422, (6 S. W. 74); *Klix v. Nieman*, 68 Wis., 271, (32 N. W. 223); *Dobbins v. Railway Co.*, (Tex. Sup.) 41 S. W. 62; *Richards v. Connell*, 45 Neb., 467, (63 N. W. 915); *City of Omaha v. Bowman*, 52 Neb., 293, (72 N. W. 316); *Peters v. Bowman*, 115 Cal., 345, (47 Pac., 113, 598). They are cases of small children drowning in resevoirs or pools of water, in most instances unprotected by fence, whereas in this instance the reservoir was well fenced. Those cases are apposite to this in similarity of source of injury and character of the persons injured. Many cases may be cited of injury from other causes to persons on ground occupied by others. They involve the same principle, regardless of different cause of injury; that is, that the owner of the ground owed no duty to one having no legal right to be upon the ground. Recovery was refused in *Gay v. Railway Co.*, 159 Mass., 238, (34 N. E. 186,) to a boy ten years old, who went on a car unlawfully standing in a street, and was injured by a recoiling brake not properly fastened. It was said that, if standing on the company's ground, it would be most clear that the company would not be liable; and, as it was, the court said that the defendant was not liable. In *Railway Co. v. Edwards*

(Tex. Sup.) 36 S. W. 430, an eight year old child in the lot of the company open on one side was crushed by a pile of plank improperly piled. In *Talty v. City of Atlantic*, 92 Iowa, 135, (60 N. W. 516), child was injured by going down path from street, and crushed while digging sand by a bank caving. It was held that the city was not bound to fence the path. In *O'Conner v. Railroad Co.*, (La.) 10 South., 678, children usually played in a block with openings in fence, and one of seven years was injured. In *Railroad Co. v. Bockoven* (Kan. Sup.) 36 Pac., 322, a child of five years was killed while swinging, by a falling gate, which was defective and dangerous. In *Ratte v. Dawson*, 50 Minn., 450, (52 N. W. 965), a child of three years was playing in a pit caused by taking out sand, and wholly unguarded, in a vacant lot, and was killed by a falling embankment left in dangerous condition. Children usually played in the sand, as it was attractive to them. It was held there could be no recovery, as there was no duty on the owner to keep his premises safe. In *Barney v. Railroad Co.*, 126 Mo., 372, (28 S. W. 1069), the railroad owned a yard not fenced, where children went to play, and one of six years jumped on a train and was injured. Held no duty to the child was on the company. In *Vanderbeck v. Hendry*, 34 N. J. Law, 467, defendant owned a board yard in a populous part of city, frequented by children, and a child injured by a falling pile of lumber, not in safe condition, was denied recovery, because no duty as to the child rested on the defendant to pile the plank properly. In *Clark v. City of Richmond*, 83 Va., 355, (5 S. E. 369), the city had made excavation on land of another, who had erected a wall along the street, and a child of six years walked on the wall, and fell into the pit. The court said the city owed him no duty, as he went upon property where there was no duty owing him. *McGuinness, v. Butler* (Mass.) 34 N. E. 259, denied relief to a child injured by pulling upon himself a slab left by the owner leaning against his shop, one end in the street and the top a few inches inside his line.

But it is contended that, while this doctrine that no duty lies upon the owner of property to keep it in safe condition as to trespasser applies to persons who have attained

years of discretion, the case is wholly different as to children of tender years; that as to them the owner cannot use the property as he chooses, but must so use it as not to injure them. Perhaps this is stating the position of plaintiff's counsel too broadly. The position is that the owner cannot erect or continue on his property any structure, establishment, or machinery that is at the same time in dangerous condition, and calculated to attract and allure young children to it. It must be both to sustain a recovery. This position is sought to be supported by what is called the "Turn-table Cases" (*Railroad Co. v. Stout*, 17 Wall., 657, and other cases following it). In that case a boy was injured while playing on a railroad turn-table left unlocked, and was allowed a recovery. The case is most unsatisfactory. The opinion is not clear. It seems to go upon the idea, as an element of decision, that to deny

recovery it was necessary to impute contributory negligence to a child; whereas the matter in that case did not, nor does it in this case, involve contributory negligence, which is foreign to our question, which question is whether the defendant owes duty to a child wandering upon the defendant's premises and injured by its lawful works. A. In the *Stout Case* the real point of the decision is that the case should have gone to the jury, rather than a flat decision of defendant's liability, though I do not say it was not involved. But the *Stout Case*, if carried to the length to which it is sought to be carried, would exact of every property owner the utmost watchfulness, vigilance, and expenditure to guard against hurt to children, else he would be every moment in danger of ruinous damages. It attacks the right of free use of one's property in lawful business. A railroad liable because it happened to leave a turn-table unlocked, as turn-tables often are, on its own track,—a necessary appliance in a lawful business! Ought a farmer be liable for failing to put a picket fence around his pond necessary for his cattle? If he does not, some little boy will climb the fence into the farmer's field, drown in the pond, and the farmer is sued on the same principle. The dam that contains water to turn the mill wheel, having a path around it shaded with willows, is very alluring to the child and the man. Must the miller inclose

it? The canal, with its towpath and frogs, is very attractive to the little boy or girl, and dangerous too. If a child drown in it, is the company liable? How many more instances of things useful in lawful business, and withal very attractive to children, and very dangerous, might be put? And the rule contended for says that, if the thing causing the injury be attractive or seductive, the liability attends it. How many things are, or may be, so to children? "A child's will is the wind's will." Almost everything will attract some child. The pretty horse or the bright red mowing machine, or the pond in the farmer's field, the millpond, canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things, attract the child as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? As was well said in *Gillespie v. McGowan*, 100 Pa. St., 144, this rule "would charge the duty of the protection of children upon every member of the community except their parents." A very onerous duty! *Nolan v. Railroad Co.*, 53 Conn., 462, (4 Atl., 106), holds that the same precautions by property owners apply to infants and adults.

I am guilty of no undue assumption in condemning the *Stout Case*, as it has received in some courts, the most eminent in the land, open condemnation; and in others criticism tantamount to condemnation; and some which followed it limit its application to its facts or desire to recant. *Wulsh v. Railroad Co.*, 145 N. Y., 301, (39 N. E. 1068); *Frost v. Railroad Co.*, 64 N. H. 220, (9 Atl., 790); *Daniels v. Railroad Co.*, 154 Mass., 349, (28 N. E. 283); *Barney v. Railroad Co.*, 126 Mo., 372, (28 S. W. 1069); *Railway Co. v. Edwards*, (Tex. Sup.) 36 S. W. 431; *Dobbins v. Railroad Co.*, (Tex. Sup.) 41 S. W. 62; *Railroad Co. v. Bockoven*, (Kan. Sup.) 36 Pac., 322; *Peters v. Bowman*, 115 Cal., 345, (47 Pac., 113, 598); *Catlett v. Railway Co.*, 57 Ark., 461, (21 S. W. 1062); *Bishop v. Railroad Co.*, 14 R. I., 320.

Here I may fitly add that the cases cited denying recovery were cases of infants of tender years. Are they all

wrong, running through so many years? Is our own *Dickens Case* wrong? And the *Woolwine* and *Poling Cases*? Another reason against applying the *Stout Case* to mulct the City of Wheeling in damages is that, as often construed, that case only applies to "dangerous machinery." Several courts which followed it have since said it ought to be limited to its particular facts. Whether the distinction between "dangerous machinery" and other means of injury be clear or not, several courts and text writers have made it. Railroad cars held not such "dangerous machines." *Barney v. Railroad Co.*, 126 Mo., 372, (28 S. W. 1069); *Catlett v. Railroad Co.*, 57 Ark., 461, (21 S. W. 1062). Cars are attractive to children, but the law does not require a guard to keep children from standing cars. *Railroad Co. v. McLaughlin*, 47 Ill., 265.

Now, I do not suppose this reservoir of the city would come under the head of "dangerous machinery." If so, what structure or establishment might not? At any rate, if that is "dangerous machinery," hundreds of necessary things would fall under this head of liability not heretofore regarded as dangerous and attractive to children, and greatly endanger the maintenance of many things necessary in life and business, and be an enormous burden to guard and watch with never sleeping eyes. Strange to me the idea that such a reservoir can be made to come under this rule. And I say that the reservoir is not "dangerous" in that sense. And I say, with greater confidence, that it is not specially "attractive" in that sense. If not, there can be no recovery in this case; for on that narrow ground the case hinges. Hence the *Stout Case*, does not apply.

But a most important matter is, what is the negligence claimed to sustain this action? It is that there was a gate of entry into the inclosure containing the reservoir, which was sometimes open, and that there was an opening under the picket fence several feet deep to allow water coming into the reservoir inclosure from the hill above, from rain, to pass out so as to keep it from entering the reservoir and polluting its water. The reservoir was inclosed with a high, strong picket fence. It does not appear how the child entered the inclosure, but likely through the opening under the fence. Now, most of the cases above will show

that the city was not bound to fence, but it did securely fence, the reservoir. It adopted a reasonable precaution, and did all that reasonable care would exact. Do the gate and drain, things indispensable, convict the city of want of ordinary care or gross negligence? Surely not. The place was reasonably safe. Though people and children did sometimes go upon the city land containing the reservoir, and along the narrow path along the fence on the east side over the high, steep ground, almost a precipice of hundreds of feet, to watch games of baseball in a field below, yet there was no invitation by the city to do so. The place was uninviting and dangerous, and there was no ground for the city to anticipate that parents would allow their children there, on very dangerous ground, or that one would crawl under the fence, through this single necessary opening. The city used all due precaution. This opening was at the remote end of the inclosure, away from houses a considerable distance, and at the end of the path. The path was along the fence, was only two feet wide, and very close to the fence, and the whole space between the fence and precipice was only that wide,—a path, not a highway, and unlikely to invite people. It was not bound to use the utmost possible care to guard infallibly against all possible accidents. In *Gavin v. City of Chicago*, 97 Ill., 66, it was held that the city must keep a bridge in a reasonably safe condition, and that, though it could be made to be free from accident to playing children, yet it was not bound to so construct it as to be safe for children playing upon and around it, or place guards or mechanical contrivances to keep children off the bridge. An owner is not required to provide against remote and improbable injuries to trespassing children. *Car Co. v. Cooper*, 60 Ark., 545, (31 S. W. 154, 46 Am. St., Rep., 216), and note. One using his property in a lawful way is not under obligation to save others from inevitable accident. "He performs his duty when he uses reasonable care and precaution." *Cosulich v. Oil Co.*, 122 N. Y. 118, (25 N. E., 259). Even if the city owed a duty to the child, it was only of ordinary care. 2 Sherm. & R. Neg. (2d Ed.) § 705.

The city had a watchman there, though by no means was this required, as above authorities show. The watch-

man was not present or did not happen to see this child. The fact that it did keep a watchman did not bind the city to duty not fixed by law or a higher degree of duty than the law fixes, if any. The fact shows that the city took all reasonable precautions, and this is an unfortunate, inevitable accident, for which it is not responsible. The South Carolina court stated the point clearly, saying, as to children that there is a liability only "when, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such injury." How can we say in this case that a drain at the end of a narrow fringe of two feet, two hundred yards long, between a fence and precipice, just where the fence butted up against a high hill cut down in the construction of the reservoir, not where people usually went, very inconvenient to walkers, we may say dangerous, where there was nothing to invite them, but everything to deter, and the common ground, if such, was on the other side of the reservoir inclosure, a good distance and cut off from this point,—the point where the drain emerged being secluded, and the best point for it, and where no one would be expected to go,—how can we say the city "should reasonably anticipate injury" there, in the language of the South Carolina court? Busw. Pers. Inj. § 77, states the rule, as to children trespassing, to be that, to charge the defendant, it must appear that the act was "willfully mischievous, as by leaving a ferocious dog at liberty," and that it is to be deemed mischievous or wanton only when "the act was done in the ordinary course of his business, and by the use of appliances which do not, obviously and of necessity, expose all persons who may approach them to peril, or the exposure of which is not attended with some concealed danger." That is the test.

Now, would a farmer or millowner be liable because he left a drain under his fence and a child happened to crawl through it and fall into the pond? Certainly not. It is an unexpected, inevitable accident. Neither is Wheeling liable.

Counsel complain that the court would not allow as evidence a paper to show that the only title the city had to the land containing part of the reservoir was one vested in

it in trust as a common, and that it misappropriated it when it devoted a part of it to use for a reservoir. The city had years ago made this reservoir; had been for years in actual use of it for the purpose. It never was used as a common, in the sense of a park. Now, if the party who conferred the land upon the city, or his heirs, could stop its use for a reservoir, or in any manner complain of the act as a misappropriation, or if any one could do so, while the city was in the exclusive, unrestrained occupation of it, for reservoir purposes, it has the right to be looked upon as owner, and entitled to the immunity from damages, like any owner. Its title could not be put in question in this collateral way in this action. I think the paper was irrelevant,

Late reference is made to the case of *Rowzee v. Pierce*, (Miss.) 23 South., 307. That was an injunction to prevent a lot conveyed to a town for a park from being used as a site for a school house, and it was held that the use proposed to be made of it was against the purpose of the grant. To me it is plainly not relevant to this case. To restrain a city from diverting property to a different use from that contemplated in the grant is one thing; but the question whether it is, while in actual use of the land for such purpose, liable for an act claimed to be a negligent use of the property, which negligence does not consist in the application of the property to a use not contemplated, but in its mere handling of the property, is another question. The question here is whether the act of having the drain renders the city liable, no matter how it came by the land. Would the city be liable if the conveyance to it had been general, and not for a special purpose? I oppose imposing upon the innocent public heavy damages for the accidents and misfortunes which always have and always will attend human existence. The safety of the many is to be preferred to even the suffering and misfortunes of individuals. Judgment affirmed.

Affirmed.

CHARLESTON.

SAVAGE *et al.* v. PEOPLE'S BUILDING, LOAN & SAVINGS ASS'N.

45	275
48	538
45	275
49	45
45	275
53	403

Submitted June 15, 1898—Decided November 23, 1898.

1. BUILDING AND LOAN ASS'N—*Foreign Building and Loan Ass'n—Attorney of Record.*

A building and loan association chartered by the state of New York, which has complied with our statute by appointing an attorney in this State to accept service for it, does not thereby become a domestic corporation. (p. 278).

2. CORPORATIONS—*Foreign Corporation—Domestic Corporation—Attachment.*

A statute merely enabling a foreign corporation to hold property or do business in this State does not make it a domestic corporation, and it may be proceeded against by attachment as a foreign corporation. (p. 278).

3. RIGHT OF ACTION—*Corporations—Stock Certificates—Jurisdiction.*

A provision in one of the conditions indorsed on the certificates of stock issued by such corporation that any action brought against the association by the shareholders shall be brought in the county of Ontario, N. Y., is a void requirement, as jurisdiction cannot be taken away by consent. (p. 282).

4. CORPORATIONS—*By-Laws—Validity of By-Laws—Vested Rights.*

A corporation has not the power, by laws of its own enactment, to disturb or divest rights which it has created, or to impair the obligation of its contracts, or to change its responsibility to its members, or to draw them into new and distinct relations; and all by-laws attempting to do this are inoperative and void. (p. 280).

5. BUILDING AND LOAN ASS'N—*Stock Certificates—Withdrawal—Contracts.*

Where a certificate of stock on its face provides that the holder may withdraw the amount paid on the same to a building and

loan association, at any time within three years from its date, together with six per cent. interest, all of which are payable in the manner set forth in the articles of association and by-laws, and terms and conditions printed on the back of certificate,—the fourth of which conditions provides that “the payment on this certificate cannot be withdrawn until after three years from the date of this certificate; if withdrawn between that date and maturity, the holder shall be entitled to receive sixty dollars for each of said shares, together with six per cent. per annum,”—said condition and the by-laws of said association existing at the date of said certificate are a part of the contract, and the manner and time of withdrawal and payment cannot be changed by a subsequent by-law. (p. 280).

Appeal from Circuit Court, Wood county.

Bill by Thomas S. and E. J. Savage against the People's Building, Loan and Savings Association. Decree for plaintiffs, and defendant appeals.

Affirmed.

J. W. VANDERVORT and CHESTER M. ELLIOTT, for appellant.

VAN WINKLE & AMBLER and MOATS & PETERKIN, for appellees.

ENGLISH, JUDGE:

Thomas S. Savage and E. J. Savage, administrators of the estate of George Savage, deceased, brought a suit in equity in the Circuit Court of Wood County, against the People's Building, Loan & Savings Association, a corporation organized and existing under the laws of the state of New York, to recover from the defendant the sum of eight hundred and forty dollars, with interest thereon from the 10th day of August, 1892, claimed to be due the plaintiffs, as the withdrawal value of fourteen shares of paid-up stock in the defendant company. An attachment was sued out against the defendant, and levied on its real estate situated in said county. The sole ground upon which the order of attachment was based was that the defendant was a foreign corporation. The defense interposed with a plea in abatement of the suit, a plea in abatement to the attachment, and a demurrer and answer to the bill. Depositions were taken by plaintiffs and defend-

ant. Objections were sustained to the pleas in abatement. The demurrer to the bill was overruled. A decree was rendered against the defendant for one thousand one hundred and five dollars and eighty-six cents. The attachment was sustained, and the real estate levied on was directed to be sold to satisfy said debt, upon the terms prescribed in said decree. The defendant then moved the court to modify the decree so that interest should be calculated on the eight hundred and forty dollars only from the date said shares of stock in controversy were presented to defendant association for withdrawal, to-wit, September 9, 1895, which motion was overruled. The defendant also moved the court to require plaintiffs and the special commissioners appointed to enforce said decree to do so in such manner that plaintiffs should only participate equally with the other stockholders who filed withdrawals of their shares with said association at the same time or before plaintiffs filed withdrawals of their shares, in order that all stockholders might be placed in the same position, and the withdrawing shareholders might all have equal standing, which motion was overruled, and the defendant obtained this appeal.

The first error assigned and relied on by the defendant is that the court erred in failing and refusing to dismiss the plaintiffs' bill upon the plea in abatement to said suit. This plea, in substance claims that the plaintiffs did not at the time of the institution of said suit have a right to institute it in the State of West Virginia, because, as fully shown in the bill, if any such suit or action existed at the time the same was instituted, it should have been brought in the county of Ontario and state of New York; that it is a corporation of the state of New York, and has fully complied with the laws of West Virginia governing foreign corporations doing business in this State, has caused an attorney in fact to be appointed, as required by statutes of West Virginia, and the plaintiffs could not obtain jurisdiction by attachment of defendant's property in this State; that defendant is a solvent corporation, and no ground for said attachment existed. This question was passed upon by this Court in the case of *Quesenberry v. Association* (recently decided, and not yet officially reported) 30 S. E.

73, in which it was held: "(1) A suit against a foreign corporation may be brought in any county wherein it has estate or debts due it. It is a nonresident, under clause 3, s. 1, c. 123, Code 1891. (2) The appointment by a foreign corporation of an attorney in this State to accept service of process does not make it a domestic corporation. (3) A statute merely enabling a foreign corporation to hold property or do business in this State does not make it a domestic corporation." BRANNON, PRESIDENT, in delivering the opinion of the court used the following language: "Another point is made that, as this foreign corporation had appointed an agent to accept service of process, it is not liable to attachment. It is a foreign corporation, and is a nonresident, and the fact that it owns property here no more converts it into a resident than it converts a natural person into a resident. It dwells—has its habitat or domicile—in New York, where it was chartered;" citing *Humphreys v. Newport News & M. V. Co.*, 33 W. Va., 137, (10 S. E. 39).

It is insisted by counsel for the appellant in his brief that this suit abated by reason of the fact that the summons was issued on the 2d day of December, 1895, and was returnable to rules to be held on the 1st of December, 1895,—a day prior to the date on which it issued, and before the suit was instituted,—and a considerable portion of his argument is devoted to the consideration of this alleged mistake. A stipulation is filed with attorneys' brief for the appellees, signed by counsel for both parties, which reads as follows: "It is stipulated and agreed that the original summons in this case was issued to rules to be held on the first Monday of December, 1895, whereas it is printed on page 7 of record as 'on the 1st day of December, 1895.'" This stipulation therefore disposes of the first assignments of error, which were based upon the alleged fact that said summons was returnable to the 1st day of December, 1895.

The appellant assigns as the third point of error that the court erred in not sustaining the demurrer to plaintiffs' bill, and in overruling the same; as the bill clearly shows on its face that there was no debt due at the time of the institution of this suit. Can this assignment be sustained?

This suit was instituted December 2, 1895, and was predicated upon the alleged fact that they were the owners of fourteen shares of the defendant's stock, on which they had paid the sum of eight hundred and forty dollars. By article 29 of the by-laws of said corporation, in force at the time the plaintiffs became the owners of said stock, "members holding paid-up certificates, might, upon the surrender of such certificates, withdraw the amount paid on the same, at any time after three years from the date of issue, and before maturity, together with an annual interest of six per cent., said interest to be computed upon the withdrawal of paid-up certificates for even months only, and such paid-up certificates should cease bearing interest after the date of such application for withdrawal." The stock held by plaintiffs was issued August 10, 1892, and the holders were entitled to withdraw after three years from that date, by complying with the requirements of the by-laws then in force, as plaintiffs contend. Plaintiffs, between the 4th and 9th of September, 1895, executed proper applications for withdrawal, and sent them, by letter, their receipt, by defendant acknowledged, stating that they had been placed on file, and would be paid in regular order, under the rules of the association. Upon receipt of that letter, plaintiffs demanded immediate payment of the amount due, according to the contract. And by letter dated September 27, 1895, defendant informed plaintiffs that only one-half of the receipts of the association were applicable to the payment of withdrawals; that there were applications for withdrawal filed before theirs, amounting to one hundred and thirty thousand dollars, and the receipts of the association averaged about seven thousand five hundred dollars a month, and plaintiffs' certificates would have to wait their turn for payment. The by-laws under which the manner of payment of withdrawals was adopted was passed January 12, 1895, and formed no part of defendant's by-laws on August 10, 1892, when plaintiffs became owners of said certificates. On the face of these certificates of shares it was contracted that, in consideration of the money received, and full compliance with the terms and conditions as printed on back of certificates, the by-laws, etc., all of which were made

part of the contract, said defendant would pay said shareholders, their heirs, administrators, or assigns, the sum of ——— dollars at the end of five years, or at maturity. One of the conditions on the back of said certificate was that "the payment on this certificate cannot be withdrawn until after three years from the date" thereof; "if withdrawn between that date and maturity, the holder shall be entitled to receive sixty dollars for each of said shares, together with six per cent. interest per annum." These, with article 29 above quoted, were the conditions bearing upon the question of withdrawal from the association at the time plaintiffs became the owners of the certificates upon which this suit was predicated. They became part of the contract.

Could the contract be varied or altered by the enactment of subsequent laws, changing time and terms of payment? On this point, Beach on the Modern Law of Contracts (section 1223, p. 1615) says: "A person has the right to treat the by-laws given to him on becoming a member of the association as all the by-laws such association has; and he is not bound to take notice of modifications of such by-laws with respect to withdrawing, on the record of the company simply, without further notice to him, which notice must be proven by the defendant company to have been given,"—citing *McKenney v. Association*, 8 Houst. 557, (18 Atl. 905). Again, in *Association v. Lewis*, 1 Colo. App. 127, (27 Pac. 872), the court held that: "Where plaintiff became a member of defendant building association at a time when a by-law provided that all nonborrowing stockholders wishing to withdraw shall be privileged so to do upon giving notice to the directors of his or her intention, and shall be entitled to receive the amount of installments actually paid in without interest, plaintiff's right of withdrawal was a vested right, of which defendant could not deprive him without his own consent by a subsequent repeal of the by-law." The general proposition is well and properly stated in 5 Am. & Eng. Enc. Law, 96, where it says: "A corporation has not the power, by laws of its own enactment, to disturb or divest rights which it has created, or to impair the obligations of its contracts, or to change its responsibility to its members.

or to draw them into new and distinct relations; and all by-laws attempting to do this are inoperative and void,"—citing numerous authorities, among them *Pulford v. Fire Department*, 31 Mich., 458, where it is said: "By-laws and regulations of corporations merely govern future action. *Ex post facto* laws are no more lawful for corporations than for states." See, also, *Kent v. Mining Co.*, 78 N. Y., 159; *Becker v. Insurance Co.*, 48 Mich., 610, (12 N. W., 874).

Authorities might be multiplied upon this question, but these are regarded as sufficient to establish the doctrine of the inability of a corporation, by subsequent by-laws, to take from a stockholder therein vested rights, acquired under by-laws existing at the date of the contract made with the corporation at the time said shares were acquired. After agreeing that stockholders may withdraw at the end of three years, upon surrender of their paid-up certificates, the amount paid on same, with interest at six per cent. per annum, such corporation cannot, by subsequent by-law, provide that the association shall not be required to pay out, on withdrawing and matured stock, more than one-half the amount received from dues and stock payments in any month. To sustain the validity of such by-law would imply the right to say that but one-tenth of the receipts from dues and stock payments in any month should be paid on withdrawal, and thus indefinitely prolong the payment of withdrawal value, when, as in this case, the holder had fully complied with all the requirements of his contract. My conclusion, therefore, is that the court committed no error in overruling the demurrer. As to the right to recover, this Court held in *Haigh v. Association*, 19 W. Va., 793, that "a member of a building association who complies with its constitution and by-laws, and, under their provisions, withdraws, can recover the amount due him under such constitution and by-laws, by an action of *assumpsit* in which there is no special count, but only the common counts." So, in a recent case decided by the supreme court of South Carolina (*McNab v. Association*, 27 S. E. 543), it is held that "where a building and loan association's by-laws provide that a member who has made all payments may surrender his shares of stock

at any time after a certain period from the date of certificates, on giving a certain notice, and take the withdrawal value thereof in cash, the relation of debtor and creditor is established as soon as the member has surrendered his stock, and has given the required notice." In the case at bar these shareholders appear to have done all that their contract and the rules required of them, to entitle them to the withdrawal value of their shares with interest; and we must hold that the relation of debtor and creditor was established at the time the suit was brought.

The contention that the defendant was improperly proceeded against as a nonresident or foreign corporation has already been considered, and shown to be no longer an open question in this State.

The ninth condition found on the back of the certificates of shares, providing that any action brought against the association by shareholders shall be brought on or before six months from the date the cause of action accrues, and, in the county of Ontario, N. Y., was a void requirement, as jurisdiction cannot be taken away by consent. See *Nute v. Insurance Co.*, 9 Gray, 174-180; *Hall v. Insurance Co.*, 6 Gray, 185; *Reichard v. Insurance Co.*, 31 Mo., 518.

The affidavit and order of attachment sued out appear to be regular, and in compliance with the statute, and the lien thereby created properly directed to be enforced against the real estate levied upon. I am therefore of opinion that the decree complained of must be affirmed, with costs and damages.

Affirmed.

CHARLESTON.

SWING v. BENTLEY & GERWIG FURNITURE CO.

45	283
45	289
45	283
58	430

Submitted June 16, 1898—Decided November 23, 1898.

1. CORPORATIONS—*Foreign Corporation—Dissolution—Trustees—Actions.*

A receiver, trustee, or assignee of a dissolved foreign corporation, appointed in the state of its domicile, may institute in the courts of this State suits in his own or the corporate name for debts or claims due such corporation. (p. 285).

2. CORPORATIONS—*Foreign Corporation—Receivers—Appointment of Receivers.*

Circuit courts of this State are authorized by sections 58, 59, chapter 53, Code, in proper cases therein set forth, to appoint receivers for and wind up the affairs of foreign corporations who have done business, acquired property, and contracted debts in this State. The law on this subject as propounded in the case of *Nimick v. Iron Works Co.*, 25 W. Va., 184, has been superseded by chapter 39, Acts 1885. (p. 286).

3. CORPORATIONS—*Foreign Corporation—Insurance Premiums—Recovery.*

Before a receiver or a trustee of a dissolved foreign corporation can recover on a premium note a *quasi ex parte* assessment, he must show that the conditions precedent to such recovery contained in such note have been fully satisfied. (p. 287).

Error to Circuit Court, Wood County.

Assumpsit by James B. Swing, trustee, against the Bentley & Gerwig Furniture Company. There was a judgment for defendant, and plaintiff brings error.

Reversed.

J. W. VANDERVORT, for plaintiff in error.

VAN WINKLE & AMBLER, for defendant in error.

DENT, JUDGE:

On the 23d day of July, 1897, James B. Swing, trustee of the creditors and stockholders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, in the Circuit Court of Wood County instituted an action of *assumpsit* against the Bentley & Gerwig Furniture Company on the following note: "In consideration of the policy No. 1,067, dated the first day of October, 1888, we promise to pay the Union Mutual Fire Insurance Company of Cincinnati, Ohio, the sum of four hundred and sixty-four dollars and sixty cents (\$464.60), by such installments and at such times as the directors of said company shall assess and order, pursuant to the charter and by-laws thereof, and it is expressly agreed that this note is not transferable, and the liability is only for the losses and expenses incurred by the said company, and that no liability is incurred beyond the face amount thereof. (The secretary is authorized to insert the number and date in this note, and, in event of renewal or reissue, to change number and date to that of the new policy). Cincinnati, Ohio, August 10th, 1888. Bentley & Gerwig Furniture Company"--for the purpose of recovering a special assessment of one hundred and eighty-five dollars and eighty-four cents, balance on said note, made by him by virtue of the laws of Ohio, and under the supervision of the supreme court thereof, in certain proceedings therein pending for the final dissolution and winding up of the affairs of such Union Mutual Fire Insurance Company. The defendant demurred to the plaintiff's declaration, the circuit court sustained the same, and, plaintiff not wishing to amend, the case was dismissed. Plaintiff obtained a writ of error.

The defendant insists that the demurrer was properly sustained for two reasons: (1) Because the plaintiff, being the legally appointed receiver or trustee of a foreign corporation, could not sue in the courts of this State, but was confined to the state of his appointment. (2) The declaration did not show a sufficient cause of action. As

to the first of these objections, the law is now settled by an irresistible preponderance of authority that a receiver, trustee, or assignee of a foreign corporation, with general powers over the property of such corporation, has the right, by virtue of the comity existing between the various states of this Union, to sue for any debt, claim, or property owing to or belonging to such corporation. Such receiver, trustee, or assignee, being clothed with the full powers of such corporation, and the right to exercise them in so far as is necessary to wind up its affairs, is the sole legal representative thereof, with full authority to reduce to possession the corporate property wherever found. This principle is admitted as settled law in the case of *Grogan v. Egbert*, 44 W. Va., 75, (28 S. E. 714). Defendant's counsel in his brief fails to produce authority justifying a change in opinion on the subject. The same comity should be shown to the citizens of Ohio, at least, as that state extends to citizens of other states. In the case of *Bank v. McLeod*, 38 Ohio St., 174, the law of Ohio is recognized as above stated. On page 184 Judge Johnson says: "The distinction is drawn between the case of a receiver acting under the inherent force of his appointment alone, and a case where, by the terms of his appointment, he is directed to gather the assets wherever found. The power of a court to confer such authority on a receiver is not limited to property found within the state where he is appointed. It is not necessary that the property should be within the jurisdiction of the court. Thus, the courts of England have appointed receivers to manage landed property in India, Canada, China, Ireland, and South American states and other places. 2 Daniell, Ch. Pl. & Prac., *1731, and cases cited. So, on principles of comity, the aid of a New Jersey court was extended to a foreign receiver to obtain possession of property, as against the officers of a corporation of which he was receiver, who may be endeavoring by fraud or subterfuge to withhold it. *Bidlack v. Mason*, 26 N. J. Eq., 230. * * * Great reliance is placed on the remarks of Mr. Justice Wayne in deciding the case of *Booth v. Clark*, 17 How., 334, where it is said 'that the receiver's right to the possession of the property is limited to the jurisdiction of his appointment.' This and

other remarks of the learned judge are termed dicta when applied to cases like the present. *Hurd v. City of Elizabeth*, 4 N. J. Law, 41; *Ex parte Norwood*, 3 Biss. 512, Fed. Cas. No. 10, 364." Authorities sustaining this conclusion are so numerous that it is useless to repeat them here, as it has already become text-book law. The case of *Nimick v. Iron Works Co.*, 25 W. Va., 184, is referred to and relied upon. The decision in that case was to the effect that a general suit to settle up the affairs of a foreign corporation and assess liabilities against the stockholders must be brought in the state of its domicile or origin, as such settlement must be had in accordance with the law of its creation and charter, which could not be enforced in this State. The decision which was rendered November 29, 1884, was superseded by chapter 39, Acts 1885, which gave the circuit courts of this State jurisdiction to appoint receivers for and wind up the affairs, in proper cases therein set forth, of foreign corporations who have done business, acquired property, and contracted debts in this State. See sections 58, 59, c. 53, Code. By virtue of these sections suits may be brought in the name of dissolved corporations, foreign and domestic, so far as necessary or proper "for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto."

2. The defendant further insists that the declaration fails to show a good cause of action in that it is for an assessment made by a foreign receiver of a foreign corporation, under the supervision of a foreign court without jurisdiction, and whose decree sued on is not properly set forth. The suit is an action of *assumpsit*, on a conditional note, and not on the decree of the court. The plaintiff alleges that the assessment was legally made by him under the laws of the state of Ohio "in order to pay the just losses and expenses of the said Union Mutual Fire Insurance Company and the expenses of winding up its affairs according to law;" that the same was reported to and approved by the court of his appointment, and he directed to collect the same. These are allegations showing the

legality of the assessment, and therefore its binding character on the defendant. This assessment, thus made in its absence, being personal in its nature, has the same binding force and effect on it as made by the corporation itself if not dissolved. The trustee, under the supervision of the court, was clothed with the full power of the corporation so far as necessary to close up its business. Therefore it devolves upon the receiver to allege and prove that such assessment so made by him is fully covered by the note sued on. The defendant objects that the declaration does not exhibit the losses and expenses, and show explicitly what they were. This, of course, could have been done, but it is not absolutely necessary, to make the declaration good under section 29, chapter 125, Code, but is matter that the plaintiff must show by his proof as a condition precedent to his right to recover. Mor. Priv. Corp. § 158. The allegation is general, but the proof must be specific. The corporation, having been dissolved at the time of the assessment, could hardly be held in existence and representative of the defendant so as to render the order confirming the assessment conclusive as to it in its absence. Hence the burden is not cast on him of showing that the assessment was unjust and contrary to his obligation or undertaking but it devolves on the plaintiff to establish his right of recovery. This is not a general assessment upon unpaid stock on all stockholders, as in the case of *Hawkins v. Glenn*, 131 U. S., 319, (9 Sup. Ct., 739), and other cases of similar character relied on by plaintiff, but it is a specific assessment on a note limited by express agreement to the "losses and expenses incurred by the company." If the company itself had made the assessment, although the same rules so far as applicable govern in both characters of cases, it would have been bound to show, on resistance of payment thereof, that it was within the liability covered by the note, as the proof of the same is wholly within its power. Such being the case as to the company, its trustee could have no greater power. Nor does it entail any hardship upon him, as all the proofs are in his hands and under his control. This, however, is a question of proof, and does not arise on demurrer; which admits the truth of the allegations contained in the declar-

ation. These appear to be sufficient to justify a recovery, if sustained by proof. The judgment of the circuit court is reversed, the demurrer overruled, and the case is remanded for further proceedings according to law.

Reversed.

CHARLESTON.

SWING v. PARKERSBURG VENEER & PANEL CO.

Submitted June 16, 1898—Decided November 23, 1898.

1. CORPORATIONS — *Foreign Corporation — Dissolution— Trustees— Actions.*

A receiver, trustee, or assignee of a dissolved foreign corporation appointed in the state of its domicile may institute in the courts of this State suits in his own or the corporate name for debts or claims due such corporation. (p. 289).

2. CORPORATIONS—*Foreign Corporation—Receivers—Appointment of Receivers.*

Circuit courts of this State are authorized by sections 58, 59, chapter 53, Code, in proper cases therein set forth, to appoint receivers for and wind up the affairs of foreign corporations who have done business, acquired property, and contracted debts in this State. The law on this subject, as propounded in the case of *Nimick v. Iron Works Co.*, 25 W. Va., 184, has been superseded by chapter 39, Acts 1885. (p. 289).

3. CORPORATIONS—*Foreign Corporation— Insurance Premiums— Recovery.*

Before a receiver or trustee of a dissolved foreign corporation can recover on a premium note a *quasi ex parte* assessment, he must show that the conditions precedent to such recovery contained in such note have been fully satisfied. (p. 289).

Error to Circuit Court, Wood County.

Assumpsit by James B. Swing, trustee, against the Parkersburg Veneer & Panel Company. There was a judgment for defendant, and plaintiff brings error.

Reversed.

J. W. VANDERVORT, for plaintiff in error.

VAN WINKLE & AMBLER, for defendant in error.

DENT, JUDGE:

James B. Swing, trustee of the creditors and stockholders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, on the 11th day of March, 1889, in the Circuit Court of Wood County, instituted a suit against the Parkersburg Veneer & Panel Company on the following premium note: "In consideration of policy No. 3,400, dated the first day of October, 1888, we promise to pay to the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, the sum of four hundred and eighty-seven dollars and fifty cents (\$487.50,) by such installments and at such times as the directors of said company shall assess and order, pursuant to the charter and by-laws thereof, and it is hereby expressly agreed that this note is not transferable, and the liability is only for the losses and expenses incurred by the said company, and that no liability is incurred beyond the face amount hereof. (The secretary is authorized to insert number and date in this note, and, in event of renewal or reissue, to change the number and date to that of the new policy). Cincinnati, Ohio, November 1st, 1889. [Signed] Parkersburg Veneer and Panel Company." A balance of three hundred and twelve dollars is claimed as due thereon. Defendant demurred to the declaration, which was sustained. A writ of error brought the case to this Court. The questions and points raised in this case are similar to the ones raised in the case of the Same Plaintiff v. Furniture Co. (decided at this term) 31 S. E. 925, and the same conclusion in regard thereto is reached. And for the same reasons the judgment of the circuit court is reversed, the demurrer overruled, and the case is remanded to the circuit court for further proceedings according to law.

Reversed.

CHARLESTON.

WATSON v. WATSON.

Submitted June 9, 1898—Decided November 23, 1898.

45	290
45	404
45	290
48	631
45	290
49	132
49	184
49	426
49	447
45	290
55	877
45	290
58	212

1. RES ADJUDICATA—*Bill in Equity—Jurisdiction.*

A bill in equity dismissed generally, without any reservation to the plaintiff to sue thereafter, is conclusive between the parties, and those claiming under them, of all the issues made up in the cause, even though there was no jurisdiction in equity because of adequate remedy at law. (p. 295).

2. UNLAWFUL ENTRY AND DETAINER—*Title—Justice of the Peace—Affidavit.*

On the trial of a warrant issued by a justice in unlawful detainer, if answer of title is filed by the defendant setting forth therein the facts showing that such title will come in question on the trial thereof, which answer shall be properly verified by his affidavit or that of his agent or attorney, if the justice be of opinion that the facts therein stated show that the title to real property will so come in question he shall dismiss the action at the costs of the plaintiff, unless the plaintiff or his agent or attorney shall file an affidavit denying the truth of such facts. (p. 296).

3. UNLAWFUL ENTRY AND DETAINER—*Title—Justice of the Peace—Appeal—Dismissal.*

If an appeal to be taken from the judgment of a justice in such case to the circuit court, and if there appears by answer filed that the title to the property will come in question, it will be the duty of the court to dismiss the action. (p. 296).

4. EQUITY JURISDICTION.

When a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved to avoid a multiplicity of suits. (p. 295).

Error to Circuit Court, Barbour County.

Action by William E. Watson, executor of Thomas F. Watson, against J. C. Watson. From a judgment dismissing the action, plaintiff brings error.

Affirmed.

JOHN J. DAVIS, and W. T. ICE, for plaintiff in error.

SAMUEL V. WOODS, for defendant in error.

ENGLISH, JUDGE:

This was an action of unlawful entry and detainer, brought by William E. Watson, executor of Thomas F. Watson, deceased, against J. C. Watson, before a justice of the peace of Barbour County, on the 23d of November, 1896. The parties appeared, and the defendant filed his answer denying that he unlawfully detained the premises mentioned, or that any damages had been sustained by the plaintiff by reason thereof or otherwise; also claiming that in the trial of said action the title to the premises described in the warrant would come in question, and for that reason the justice had no jurisdiction thereof. In his answer the defendant also set out the following facts tending to show that the title would come in question, to wit: That in the year 1894, when the land in question was bought and conveyed to plaintiff's testator, the same was bought by him for defendant, who was his relative; that defendant was placed by him in possession thereof, which he had since held under said purchase; that testator was a wealthy man, who had reared defendant, was unmarried, and about the time of said purchase defendant had come to West Virginia from his home in Kansas to take possession of said land under a parol gift to defendant of same; that testator gave the land to defendant, and under the gift he took possession of it as his own, used it, paid the taxes thereon, and is in undisturbed possession of it, save by this suit and a chancery suit then pending in the circuit court of Barbour County styled "Wm. E. Watson, Ex'r, v. J. Creed Watson," which was made part of said answer and defense; that of all these facts the plaintiff, by himself and his agent, had full and complete notice, and had had from the date of said purchase by testator and the conveyance to him by Worthington Ward by deed dated March 13, 1894, of the land in controversy.

The defendant also tendered a special plea in writing, which was rejected by the justice, and, all the evidence having been heard, judgment was rendered for the plaintiff for the possession of the land described in the summons, and twenty dollars damages and costs. From this judgment the defendant appealed to the circuit court. When said appeal was called in the circuit court, the appellant tendered a plea in writing, marked "No. 1," to which the appellee objected and moved the court to reject same, which motion was overruled, and said plea allowed to be filed, and the appellee excepted. This plea claimed that the plaintiff ought not to maintain said action because on July 14, 1896, said William E. Watson, executor, etc., instituted a suit in chancery in the circuit court of Barbour County against the appellant in which he alleged, among other things, that at the time of the death of his testator he was the owner of said land, called the "Worth Ward Farm;" that soon after the same was conveyed to him he placed appellant in possession thereof as his tenant, until about April 6, 1896, when plaintiff and defendant entered into a written contract under which defendant surrendered the said farm, and the plaintiff by his agent, took possession thereof; that in June, 1896, plaintiff learned that defendant was on said farm claiming its possession, and was about to cut grass, etc., and otherwise control the same; charging that defendant was insolvent, and if he cut the grass and pastured the land it would work plaintiff irreparable damage; praying an injunction to restrain defendant from the acts and claims aforesaid, and for general relief,—which injunction was awarded and made effective on July 14, 1896. To this bill defendant demurred and answered putting in issue every material allegation of the bill, and claimed that he was in possession, and had so continued, of said land since the execution of the deed therefor to Thomas F. Watson on March 13, 1894, and that he was entitled to its possession; also averring that the title to T. F. Watson was not such as passed to the executor, a title in fee, and that his title thereto was disputed by respondent, and that said decedent did not in terms nor by implication undertake to devise said land to the plaintiff or with intention to vest him with the title thereto; further aver-

ring that respondent was the owner of said farm which was purchased by said Watson for him; that defendant was put in immediate possession, and the title to said land was vested in trust only in the said decedent, who supposed the title was in respondent,—to which answer the plaintiff replied generally. Such proceedings were had that the injunction was dissolved, the bill dismissed at the costs of plaintiff, as shown by exhibits filed with said plea, and the defendant said that the parties to said suit in chancery, and the parties to this action of unlawful detainer, are the same persons, suing in the same rights, touching the same subject-matter, to wit, the right to possession of said land; and, the same having been adjudicated in said chancery cause, the plaintiff is estopped thereby to prosecute this action brought on the 18th of November, 1897. On November, 2, 1897, the defendant filed his answer of title, and gave notice that upon trial of the action he would read the depositions of V. Goff and others, filed in the clerk's office to be read in his behalf. On March 2, 1898, the plaintiff moved the court to strike out defendant's special plea, and also to reject his answer of title filed before the justice and his supplemental answer filed in open court, which motion the court overruled. The plaintiff excepted and replied generally to said plea, and issue was joined thereon. The defendant pleaded not guilty, and issue was joined thereon. On the same day the cause was submitted to the court in lieu of a jury, and the court having heard and considered all the evidence adduced, found for the defendant upon the plea of *res adjudicata*, and also found for the defendant upon the evidence adduced upon the general issue, and dismissed the plaintiff's action with costs. The plaintiff took several bills of exceptions to the rulings of the court, and obtained this writ of error.

The question presented for our consideration and determination in this case is whether the defendant at the date of the summons unlawfully withheld from the plaintiff the possession of the premises in controversy. Defendant, by his pleadings, claims that this question is *res adjudicata*; that it has already been heard and determined by a court of competent jurisdiction, in a suit between the same parties and in regard to the same subject-matter, and exhibits

with his plea the record and proceedings in a chancery suit which was instituted and prosecuted to a termination in Barbour County, in which said William E. Watson, executor of the last will and testament of Thomas F. Watson, was plaintiff, and J. Creed Watson defendant; and it appears that in the bill filed in said cause the plaintiff claimed that the defendant was wrongfully in possession of a portion of said land, and that it was his intention to take absolute control of said farm in possession of the plaintiff, and to cut the grass and pasture the land; that his title as executor of said T. F. Watson was undisputed, and he prayed for an injunction restraining the defendant from cutting the grass, etc., or interfering with the stock then on said land by consent of the plaintiff,—which injunction was granted. The defendant answered and put in issue every allegation of the bill as to title or possession of said land, and such proceedings were had in the cause that the injunction so obtained was dissolved and the bill dismissed, with costs. Now, this bill certainly claimed that the plaintiff was entitled to the possession, and that the defendant was trespassing on the premises, and was insolvent; and plaintiff obtained his injunction on these allegations. What was the effect of the dismissal of the bill and dissolution of the injunction?

In the case of *Schoonover v. Bright*, 24 W. Va., 698, this Court held that: "(1) An injunction will be dissolved on the hearing, if the answer fully, plainly, and positively denies all the material allegations of the bill on which the injunction was founded, and there is no proof to establish said allegations. (2) To warrant the interference of a court of law to restrain a trespass two conditions must co-exist: First, the plaintiff's title must be undisputed or established by legal adjudication; and, second, the injury complained of must be irreparable in its nature." In the above chancery suits as we have seen, every material allegation of the bill was denied, and we must also infer that there was no proof to support said allegations; secondly, it appears that the plaintiff's title was disputed, and nothing was brought forward to properly establish it. The bill asserted the right of the plaintiff to possession of the property, and there was a prayer for general relief, and while

equity will not, as a rule, determine disputes in regard to the possession of real estate, yet it has been held that where a court of equity has jurisdiction for one purpose, it will go on and give relief between the parties upon proper allegations. So, in the case of *Chrislip v. Teter*, 43 W. Va., 356, (27 S. E. 288), this Court held that, "when a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved to avoid a multiplicity of suits." See, also, *Hanly v. Watter-son*, 39 W. Va., 214 (19 S. E. 536); *Western M. & M. Co. v. Virginia Cannel Coal Co.*, 10 W. Va., 250, syllabus. As we have said, the plaintiff claimed in his bill to be entitled to the possession, and that the defendant was trespassing thereon. The answer denied this allegation. This pleading made an issue upon the question as to the right to the possession. What, then, is the effect of the dismissal of the bill? In *Taylor v. Yarborough*, 13 Grat., 133 the Virginia Court of Appeals held that: "A bill in equity dismissed generally, without any reservation to the plaintiff to sue thereafter, is conclusive between the parties and those claiming under them of all the issues made up in the cause." See, also, *Durant v. Essex Co.*, 7 Wall., 107, in which it is held that "a decree dismissing a bill in an equity suit in the circuit court of the United States which is absolute in its terms, unless made upon some ground which does not go to the merits, is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties." The same principle is announced in the case of *Carberry v. Railroad Co.*, 44 W. Va., 260, (28 S. E. 694). The fourth point of syllabus holds that "a decree on full hearing dismissing a bill generally, without reservation of right to the plaintiff to sue at law, is conclusive upon all the matters involved in the case, even though there was no jurisdiction in equity because of adequate remedy at law. Unless it otherwise appear from the decree, it will be taken that the dismissal was on a hearing of the merits." Upon this point see, also, *Wandling v. Straw*, 25 W. Va., 692, and *McCoy v. McCoy*, 29 W. Va., 794, (2 S. E. 809). Now, it is earnestly contended by counsel for the plaintiff in error that the court below erred in not sustaining his motion to reject

plea No. 1, tendered by defendant in error, which raises the question of *res adjudicata*. This plea included as exhibits the bill, answer, and exhibits in said chancery suit, the latter being considered part of the bill, and the decree dissolving the injunction and dismissing the bill, and I think that the right of the plaintiff in that suit to the land in controversy was involved in that suit. The exhibits mentioned in said plea were used in the suit in support of the right of possession, and they, having been before the court had already been passed upon in the chancery cause. In view of the authorities above cited, and for the reasons before stated, I conclude that the circuit court did not err in overruling the motion to reject plea No. 1, and the plea of *res adjudicata* should have been and was, properly sustained.

There is another ground upon which I believe the circuit court was right in dismissing the plaintiff's action. The suit was instituted before the justice and appealed to the circuit court, an answer of title was filed before the justice, and a supplemental answer of title was filed after the case came on the docket in the circuit court. Neither the plaintiff nor his agent or attorney filed an affidavit denying the truth of such facts, either before the justice or in the circuit court,—which state of facts made it the duty of the justice to dismiss the action, and he not doing so, it was the duty of the circuit court on appeal to have dismissed the action when such fact was brought to its attention by the supplemental answer of title. This was held in the case of *Hughes v. Mount*, 23 W. Va., 130, which was a warrant of unlawful detainer issued by a justice. Answer of title was filed which was replied to by affidavit of the plaintiff, and the warrant was dismissed by the justice. On appeal to the circuit court the action of the justice was approved, and from that decision a writ of error was obtained, and the case brought to this Court, which held that: "If in such a case the justice has so dismissed such warrant, and an appeal to be taken from his judgment to the circuit court, and the same state of facts appear to the satisfaction of such court, either by the defendant's answer or upon the trial of such warrant upon such appeal, it is the duty of such court to dismiss the

said warrant for want of such jurisdiction, without prejudice to the plaintiff's right to institute any other action at law or suit in equity which may be necessary or proper to determine his right to the land in the warrant mentioned." In the case under consideration the justice found for the plaintiff, but when the case came to the circuit court, and it appeared that the title to the land was brought in question, it was the duty of that court under the above decision to have dismissed the case. For these reasons, the judgment complained of is affirmed with costs and damages.

Affirmed.

CHARLESTON.

WILLIAMS *et al* v. MAXWELL *et al*.

Submitted Feb. 2, 1898—Decided Nov. 23, 1898.

1. **FRAUD**—*Judicial Sales—Setting Aside Sales.*

To set aside a sale for fraud and conspiracy, suit must be brought within a reasonable time after the discovery of such fraud. (p. 307).

2. **LACHES**—*Judicial Sales*

One who delays three years after knowledge of all the facts attending a sale before bringing such suit is guilty of such laches as will debar him from relief. (p. 307).

3. **ATTORNEY AND CLIENT**—*Judicial Sales.*

An attorney for a client whose property is sold at judicial sale to satisfy liens and charges against it, who notified such client prior thereto of the time and terms of sale, and of the result there-

45	297
47	300
47	765
45	297
50	381
45	297
56	238
45	297
50	282
45	297
165	648

of soon after the sale and confirmation, and no objection was made thereto by the client, the relation of attorney ceased between the parties, as to the land itself, from the confirmation of the sale, and only continued so far as such attorney might have to do with the proceeds of the sale. (p. 310).

Appeal from Circuit Court, Tucker County.

Bill by George C. Williams and others against W. B. Maxwell and others. A decree was rendered, from which defendant Maxwell appeals.

Reversed.

C. WOOD DAILY, for appellant.

F. M. REYNOLDS and P. J. CROGAN, for appellees.

McWHORTER, JUDGE:

In 1887 a suit was pending in the Circuit Court of Tucker County in the name of the administrator of Mary C. Cameron against George C. Williams and others, to subject the estate, consisting of one thousand four hundred and fifty-four acres of land, to the payment of certain debts against said estate. Mortimer G. Williams, Lucy V. Hanson, Horace D. Williams W. H. Williams, Sallie L. Reynolds, and George C. Williams, heirs at law of said Mary C. Cameron, employed W. B. Maxwell as attorney to attend to their interests in said cause as against the claim of Gertrude Hocker; and the first five gave their joint note to him. dated June 8, 1887, for forty-two dollars, payable six months after date, and George C. Williams gave his individual note to said Maxwell for ten dollars, dated said June 8, 1887, and payable six months after date. The cause was referred to a commissioner to ascertain the debts against the estate, and report made, and the land decreed to be sold, and A. B. Parsons and J. P. Scott were appointed special commissioners to make the sale. The land was advertised to be sold on the 3d day of September, 1888. The record shows that it was put up on that day, and, not a sufficient bid being received, sale was postponed until the following day, September 4th, when it was sold at public auction to L. L. McCrum for the sum of three thousand and two hundred and twenty-five dollars. McCrum paid the cash payment, amounting to one hundred and eighty-

seven dollars (being sufficient to pay the costs of suit and charges of sale), and gave his three several notes at six, twelve and eighteen months, with W. B. Maxwell as security, for the deferred payments. In August, 1887, several of the other heirs sent notes to said Maxwell against the estate for collection, which were provided for in the decree of sale. At February rules, 1892, George C. Williams, Mortimer G. Williams, Sallie L. Reynolds and T. S. Reynolds, her husband, W. H. Williams, Horace D. Williams, Lucy V. Hanson and James A. Hanson, her husband, and Martin V. Miller, administrator of Mary C. Cameron, deceased, filed their bill in the circuit court of Tucker County, against W. B. Maxwell, L. L. McCrum, J. W. Nihiser, James B. Reese, D. R. Leatherman, Cyrus H. Maxwell, and Albert Thompson, alleging that they were the heirs at law and administrator of Mary C. Cameron, daughter of George C. Harness, deceased; that in a partition suit among the heirs of said Harness, this parcel of one thousand four hundred and fifty-four acres of land was assigned to Mrs. Cameron (who, after the death of her husband, John J. Williams, father of the plaintiffs, intermarried with Dr. Cameron, who died leaving no children by her), and alleging the pendency of said suit, in which said land was sold by the administrator aforesaid; that W. B. Maxwell and purchaser, McCrum, entered into a fraudulent scheme and combination, whereby McCrum was to become the nominal purchaser of the land at the lowest possible price, and that Maxwell was to have a half, a controlling, or an entire interest in the property, and was to pay the purchase price, or a large part of it; that bidders were deterred from bidding by McCrum, and also by Maxwell, informing them that it was needless for them to bid, that McCrum was bidding solely for the heirs and proposed to buy it for them, and that, in consequence of such representations, outside bidding ceased, and the land was knocked off to McCrum at less than one-fifth its value; that Maxwell became McCrum's security on the purchase notes, and that McCrum has since the sale stated that he and Maxwell were partners; that decree was entered in said cause on the 9th day of September, 1889, confirming a report made therein by Commissioner J. J. Adams, ascer-

taining the debts against the estate and their priorities, including a claim of purchaser, McCrum, for three hundred and thirty-four dollars and ninety-four cents taxes set up by petition filed by appellant, Maxwell, which accrued before the sale, and adjudicating the rights of the parties therein, and showing that after payment of all the debts there remained the sum of one hundred and twenty-two dollars and thirty-seven cents to be paid to the heirs, and which was by said decree required to be paid to the parties entitled thereto; that, within three days after McCrum obtained his deed for the land, he conveyed same to defendants Nihiser, Reese, and Leatherman, and that in such conveyance the said W. B. Maxwell and his brother C. H. Maxwell joined in the deed of conveyance, showing that the Maxwells had two-thirds interest in the property; that McCrum conveyed his entire interest a short time afterwards, which was done in part consideration for the Cameron lands in the A. B. Parsons farm, to said Maxwell, "thus rounding out and fully consummating this fraudulent transaction," as alleged in the bill; that said heirs of Cameron employed said Maxwell to attend to their interests in the said suit; that they were all nonresidents of the State of West Virginia, except George C. Williams, who was still a resident of Cabell County, this State; that J. A. Hanson and H. D. Williams were the administrators of their mother's estate in Florida, where she died; that their said attorney directed a demurrer to be entered at rules to the bills before the same were matured, and, when said demurrers were overruled, he waived the right to answer on the part of defendants; that when said one thousand four hundred and fifty-four acres of land were sold it was worth from fifteen thousand dollars to twenty-five thousand dollars; that when the day of sale came there were bidders present who would have given from ten thousand dollars to fifteen thousand dollars for the land, and were there for the purpose of bidding, but were prevented from bidding for the reason before given, and the property was knocked off to McCrum at the price of three thousand two hundred and twenty-five dollars, less than one-fifth its value, at the lowest estimation; that plaintiffs were kept in profound ignorance of said sale until long afterwards; that

defendant Maxwell had receipted to the commissioners for moneys due certain of the plaintiff heirs ascertained by the decree as well as the balance due the estate of one hundred and twenty-three dollars and thirty-seven cents, to be distributed among them, which he had not paid over to the parties entitled to it; that McCrum and Maxwell sold the property to Nihiser and others for a consideration of nine thousand dollars, as expressed in the deed, the A. B. Parsons farm being estimated at seven thousand dollars, and notes given for the two thousand dollars; that in August, 1891, said Nihiser and others sold the timber on said land to Albert Thompson, together with another tract of about the same size, for sixteen thousand dollars; that plaintiffs were uninformed whether or not defendants Nihiser and others had knowledge of the fraudulent and corrupt methods whereby the said McCrum and the Maxwells acquired title to said land, but that they, as well as Thompson, were proper parties to the proceeding, and plaintiffs entitled to a full and complete discovery as to the information they had, and, if it should turn out that they had knowledge and information of the fraud, then the plaintiffs would be entitled to cancellation of the deeds, and to have the land reconveyed to them by defendants, together with an accounting on their part of all timber removed therefrom; that, as to defendant C. H. Maxwell, his knowledge and information, as well as his participation in said fraud, was full and complete, and, if it should turn out that Nihiser and others were innocent purchasers from the Maxwells and McCrum, then the plaintiffs were entitled to recover, by proper decree, full value of said lands from said McCrum and the Maxwells, and plaintiffs would be entitled to conveyance to them of the A. B. Parsons farm as part payment of the amount found due them; and praying for general relief, according to the allegations of their bill.

The defendants Reese, Nihiser, and Leatherman, and the defendants W. B. and C. H. Maxwell, and the defendant A. Thompson, filed their demurrers to the plaintiffs' bill, all of which demurrers were overruled. Defendants Nihiser, Leatherman, and Reese filed their answer, denying all fraud or any knowledge of fraud. W. B.

Maxwell filed his answer, containing also a demurrer to the bill, denying all participation in the purchase of the land, and averring that McCrum was a *bona fide* purchaser, and denying all allegations of the bill setting up fraud against him, either on his part, or on the part of McCrum or C. H. Maxwell; averring that he was employed by plaintiffs for fifty dollars to defend the estate against the claim of Gertrude V. Hocker, which he reduced from one thousand four hundred and nine dollars and ninety-eight cents, ascertained to be due her by the commissioner, to the sum of three hundred and sixty dollars and forty-seven cents; that afterwards the plaintiffs, who were creditors of the estate, sent their claims to him for collection; denying that he tried to prevent the land bringing all it would bring, and alleging that all his actions were in good faith, and in the interest of his clients, the plaintiffs; that he never owned any interest in said lands until more than a year after they were purchased by McCrum; that he notified his clients through Hanson, the only one with whom he had communication, of the result of the sale, but failed to hear anything from them; that the sale was a fair one, and brought a fair price at the time. The defendant C. H. Maxwell filed his answer, denying all fraud on his part or that of the defendants, and all knowledge of fraud, and averring that the sale was fair and made in good faith; that while the land might have been sold for more at private sale, yet the price realized for it was, in respondent's opinion, fully up to the average price of lands sold at judicial sale; that he had no interest in the land until he bought it, more than a year after the sale to McCrum. Defendant McCrum filed his answer, denying all allegations of fraud, and alleging that the sale was fair; that he bought it in good faith; that if the defendants had come on in a reasonable time, by paying a proportion of the money he had paid and assuming that which was to become due, he would have given them an interest in the property; that neither of the Maxwells had any interest in the purchase, directly or indirectly, until they purchased an interest in it from him more than a year after his purchase. Defendant Thompson also filed his answer, denying all allegations of the bill charging fraud, or knowledge of fraud, upon him.

Depositions were taken and filed for plaintiffs and defendants. On the 20th day of June, 1894, the cause came on to be heard upon the bill, answers, and depositions, and the original record in the cause of Cameron's administrator against Williams and others, and upon the petitions and records of L. L. McCrum, Thomas Perry, and Lucy V. L. Hanson, which were heard together; whereupon the court was of opinion, upon the pleadings and proofs, that the plaintiffs were entitled to the relief prayed for in their bill, and that the judicial sale made by Commissioners Parsons and Scott in September, 1888, in said original cause, and the deed of the commissioners to McCrum for said land, should be set aside and avoided in favor of plaintiffs, as against defendants McCrum, W. B. Maxwell, and C. H. Maxwell; that the defendants Reese, Nihiser, and Leatherman were innocent purchasers of said land, without notice of fraudulent acts of defendants McCrum and Maxwells, and that they were entitled to said land, and that the sale of the timber sold to defendant Thompson could not be affected or impaired, but that plaintiffs were entitled to have said McCrum and W. B. Maxwell account to them for the full price of the land they sold to Reese, Nihiser, and Leatherman, with its interest; and the cause was referred to Commissioner W. J. Conley to ascertain the purchase price paid by Reese and others to the defendants McCrum and Maxwells, with its interest, and the total price paid by McCrum to the commissioners for said land, with its interest, and the difference between the two sums, and to ascertain the amount of money paid to W. B. Maxwell by the said commissioner belonging to plaintiffs, and received by him as their attorney, after allowing him for all proper disbursements made by him, and stating the amount due to each plaintiff, and in what manner due, whether as heir or creditor, and to ascertain and report the value of the Parsons farm of three hundred and twenty acres conveyed by Reese and others to McCrum and Maxwell and his brother, and its annual rental value. Commissioner Conley filed his report, to which various exceptions were taken by both plaintiffs and defendants.

The cause came on to be heard on the 21st day of June, 1895, upon all the papers, orders, and decrees, and upon

said report and exceptions thereto, and the court held that plaintiffs, by reason of their laches in instituting the suit, were not entitled to charge against and recover, from the defendants C. H. Maxwell and the administrator of L. L. McCrum, anything by reason of the matters set up in their bill, but that, by reason of the relationship of attorney and client that existed between them and the defendant W. B. Maxwell, they were entitled to recover from him as therein set forth, and ascertained that there is due from him, besides the moneys which he collected in the cause for the heirs against the estate, aggregating the sum of seven hundred and forty-two dollars and seventy-two cents due to certain of the plaintiffs as in said decree specified as creditors of the estate, and one hundred and twenty-three dollars and thirty-seven cents, the surplus to be distributed among all the heirs as provided by the decree of September, 1889, the aggregate sum of four thousand and thirty-six dollars and forty-four cents, including interest to the date of the decree, for which aggregate the plaintiff heirs jointly were entitled to a personal decree against said W. B. Maxwell; from which decree the defendant W. B. Maxwell appealed to this Court, assigning several errors.

It is insisted by appellant and his co-defendants L. L. McCrum and C. H. Maxwell that the bill is multifarious, and should have been dismissed on demurrer for that reason, and it is contended by defendant McCrum that he is brought in as a defendant upon a record with a large portion of which he has had no connection whatever. The matters at issue in this suit all grew out of the suit of Cameron's administrator against Williams and others. The bill seeks—First, to set aside the sale of the one thousand four hundred and fifty-four acres of land to McCrum on the ground of conspiracy and fraud, and to have the land reconveyed to them, or, in case it had passed into innocent hands without notice of fraud, that the true value be ascertained, and a decree rendered therefor against the Maxwells and McCrum, and, if plaintiffs so elect, that the A. B. Parsons farm, taken by the purchaser of the one thousand four hundred and fifty-four acres in part payment of the price of the timber sold from said one thousand four

hundred and fifty-four, acres be conveyed to plaintiffs as part payment of the amount due them from the defendants, to be ascertained in the cause; second, to require a strict accounting for, and to recover from the defendant W. B. Maxwell, certain moneys collected by him for certain of the plaintiffs, as their attorney, from the proceeds of said sale in said cause. As to these claims the plaintiffs had adequate remedy at law, and the demurrer should have been sustained as to that part of the bill. *Gay v. Skeen*, 36 W. Va., 582, (15 S. E. 64), (Syl. point 2); *Morgan v. Morgan*, 42 W. Va., 542, (26 S. E. 294), (Syl. point 1).

Defendants also allege as grounds of demurrer that plaintiffs in their bill allege no sufficient excuse for their delay in instituting this suit, having delayed it between three and four years, and until the rights of third parties had intervened; because plaintiffs did not bring or offer to bring into court, or even pay as the court might direct, the money paid out by McCrum, the purchaser of the land from the commissioners, nor the money alleged in the bill to have been expended by the defendants Maxwell; and because plaintiff should have proceeded by bill of review, or by petition for rehearing in the original cause in which said land was sold, to have the sale set aside. The authorities agree that it is utterly impossible to lay down any rule or abstract propositions as to what constitutes multifariousness, which can be made universally applicable. 1 Barb. Ch. Prac., 256. In *Dunn v. Dunn*, 26 Grat., 291, 295, it is held that a bill is demurrable for multifariousness; and cites Story, Eq. Pl. § 271: "A bill should not be what is technically termed 'multifarious;' for, if it is so, it is demurrable, and may be dismissed by the court of its own accord, even if it is not objected to by the defendant. By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Note to the same section: "Multifariousness must be objected to by the defendant on demurrer, and cannot be objected to by him at

the hearing. But the court may, however, take the objection at the hearing *sua sponte*; for the court is not bound to allow a bill of such a nature, although the parties may not take the objection in season."

The principal allegation of the bill, giving excuse for the delay in bringing this suit, is in the following words (referring to the sale of the one thousand four hundred and fifty-four acres of land sought to be set aside): "Of this sale these plaintiff heirs were kept in profound ignorance until long after, and plaintiff Miller, having been appointed as administrator solely on account of his official position as sheriff, had never paid any attention whatever in the matter." While this allegation is hardly as definite as it should be, perhaps, and fails to show the length of time they were so kept in ignorance of such sale, or to show what efforts, if any, they made to ascertain the facts, yet it makes very definite charges of fraud and conspiracy to wrong the plaintiffs, and is deemed sufficient to warrant an investigation. More than three years had elapsed after the sale before this suit was brought, and yet it is admitted by plaintiff M. G. Williams, in his testimony, that he knew of the sale from McCrum himself a few days after the sale, that McCrum had bought the land, and that the sale had been confirmed, and that he had a talk with appellant about it. This sale was made and confirmed in September, 1888. This suit was instituted in February, 1892. The record shows that Hanson, the husband of one of the heirs, and the only one with whom appellant was in correspondence, and who had employed appellant as attorney in their behalf, was informed of the time the sale was to take place; that he informed appellant that he would be present at the sale; that he could not get the balance of the heirs to do anything; and that he would have to buy it himself. He failed to attend the sale, and was informed by appellant immediately after the sale of the result of the sale, and that if he would come on and take the land at what it cost the purchaser, repaying to him the purchase money which he had paid out, and securing the balance thereafter to become due he could do so. The property was not purchased by McCrum for plaintiffs. He was not authorized to bid for them, nor was any per-

son. He could not have required them to take it off his hands. Although the plaintiffs knew immediately after the sale all about it, the price it brought, and the offer to them to take the property on the terms of the sale, yet they virtually repudiated the trust, if any was created in their favor, and with full knowledge of the sale and the price the property brought, and the confirmation of the sale, stood by more than three years after the confirmation without taking any steps to correct the wrong of which they complain.

The plaintiff M. G. Williams in his testimony says that a few days after the sale he saw the purchaser, McCrum, who said to him: "You owe me a set-up for buying your Cameron land;" that he asked McCrum if the sale had been confirmed, and he said it had; and he also states that he had an interview with appellant concerning the sale some time after the sale of the land, and charged him in said interview with fraud in relation to the sale. So it appears that plaintiffs had notice of the fraud, if any there was, immediately after the sale. In *Whitaker v. Improvement Co.*, 34 W. Va., 217, (12 S. E. 507), (Syl. point 2): "He who elects to set aside his contract for fraud must bring suit for the purpose, without unreasonable delay, after discovery of the fraud, unless there be good reason to excuse it; otherwise his delay will deny him relief." In this 34 W. Va. and 12 S. E. case, the question of laches is well discussed. In *Newcomb v. Brooks*, 16 W. Va., 32, it is held that a suit to avoid a sale for fraud must be brought in a reasonable time, though the property remains in the hands of the fiduciary. In *Strong v. Strong*, 102 N. Y., 69, (5 N. E. 799), it is held that the right to rescind a contract for fraud must be exercised immediately upon discovery thereof, and any delay in doing so, or the continued use and occupation of the property received under the contract, will be deemed an election to confirm it. Also, in *Schiffer v. Dietz*, 83 N. Y., 300: A vendee entitled to rescind a contract for fraud must act promptly on discovery of the fraud, and restore, or offer to restore, the property. By dealing with it as owner after such discovery, deprives him of this remedy. In *Hunt v. Blanton*, 89 Ind., 38, an offer to rescind a purchase of land for fraud, made five months after the

conveyance, without any reason for the delay, comes too late. Mr. Justice Lawrence, in delivering the opinion of the court in *Cox v. Montgomery*, 36 Ill., 396, says: "In a country where the values of real estate change as rapidly as in Illinois, it would be clearly unwise to permit a purchaser of land to retain it for nearly 18 months after the discovery of fraud before filing his bill to rescind. This is an unreasonable delay, which a court of chancery cannot tolerate." This case was reversed and remanded, with leave to appellee to explain, if he could, the delay in the institution of his suit. In *Sieveling v. Litzler*, 31 Ind., 13: "The party claiming to rescind a contract of sale on account of fraud must act at once upon discovery of the fraud, and he cannot postpone discovery by neglect to use ordinary diligence. This rule must be strictly enforced, where the law affords a complete remedy in damages." In the case at bar there is no evidence to show that there was any effort whatever on the part of plaintiffs to inquire into the matter of fraud, if any there was, but it is shown that they knew of the whole transaction within a few days after the sale; but it seems that there was a great increase in the value of property of that character, and in that location, in the course of two or three years after the judicial sale,—a tramway having been projected to run into the neighborhood of the land, which added immensely to its value. Touching this same question, in *Grymes v. Sanders*, 93 U. S., 55, the syllabus is as follows: "(2) Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised, at least, the degree of diligence 'which may be fairly expected from a reasonable person.' (3) Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake or fraud had not occurred. This applies peculiarly to speculative property, which is liable to large and constant fluctuations in value. (4) A court of equity is always reluctant to re-

scind, unless the parties can be put back in *statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it." 1 Pom. Eq. Jur. § 419: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. The principle has in fact two aspects, one of them wholly independent of any statutory limitations, and the other with reference to such statute. "In *Trader v. Jarvis*, 23 W. Va., 100, (Syl. point.2); "Delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver, and especially is such the case in suits to set aside transactions on account of fraud or infancy. Laches and neglect are always discountenanced by a court of equity."

It is clearly shown that neither of the Maxwells had any interest in the purchase at the time of the sale, nor until more than a year after the confirmation, and the plaintiffs utterly fail to establish their allegations of conspiracy. There was no concealment in the actions of the defendants McCrum or the Maxwells. Their acts were all frank and open. Plaintiffs wholly fail to prove any conspiracy or any intended fraud on the part of the defendant McCrum, the purchaser, or either of the Maxwells. The circuit court held that, by reason of the laches of plaintiffs in bringing their suit, they were not entitled to charge against, and recover from, defendants McCrum and C. H. Maxwell anything by reason of the matters set up in the bill, but that, by reason of the relationship of attorney and client that existed between them and defendant W. B. Maxwell, they were entitled to recover from him, as set forth in the decree. If W. B. Maxwell performed his whole duty to plaintiffs, his clients, in relation to the sale, as it appears from the record he did, having informed them of the time and terms of sale prior thereto, and having assurance from them that they would be present to attend the same, after the sale was made and confirmed, of which

they were advised, Maxwell had nothing further to do as attorney, unless plaintiffs within a reasonable time took some action in relation to the sale, or raised objection to, or protest against, it; but, having remained silent, his relation of attorney for them ceased so far as the land was concerned, and the moment such relation ceased he was at liberty to purchase the land or an interest in it; and if by their laches they were not entitled to relief against McCrum, the purchaser, how can they be injured by Maxwell purchasing an interest in the property from McCrum, who is entitled to hold it? The exceptions to the commissioner's report relate to the value of the land, the profits made upon it by the defendants, the rental value of the Parsons farm, etc.; which, in the view of the case I have taken, are immaterial.

For the reasons herein stated, decree complained of is reversed and annulled; and, the Court proceeding to render such decree as the circuit court should have rendered on the hearing of the cause, it is adjudged, ordered and decreed that the bill in this cause be dismissed, but without prejudice to the plaintiffs to take such proceedings as they may be advised to take against the defendant W. B. Maxwell to recover the various sums of money collected by him for plaintiffs in the said cause of Cameron's administrator against Williams and others, the collection of which was sought to be enforced in this cause, and that the defendant W. B. Maxwell recover his costs by him expended in his defense of this suit in the circuit court of Tucker County.

Reversed.

CHARLESTON.

ZELL GUANO CO. *et al.* v. HEATHERLY *et al.*

Submitted June 9, 1898—Decided November 23, 1898.

FRAUDULENT CONVEYANCE—*Consideration—Rights of Grantee—Rights of Creditors.*

On January 31, 1889, H. conveyed all his property, real and personal, to P., trustee, to secure his creditors named therein, in the order of priority named, including a debt of eight thousand and one hundred dollars to C., to be the first paid after taxes, etc., which eight thousand one hundred dollars included an item of six thousand five hundred dollars in cash sent to wife of H. by C. at the time of the execution of the trust. On February 2, 1889, Z. G. Company instituted suit to set aside the trust as fraudulent and void as to the eight thousand one hundred dollars secured to C., in which suit the plaintiff was successful, H. and C. were adjudged to pay the costs of the suit, and all the property conveyed in the trust was sold, and proceeds paid to the creditors entitled to it, to the exclusion of C.'s claim, which was remitted to the foot of the list of creditors to be last paid. On the 8th of January, 1891, and before final decree in the cause, H.'s wife returned to C. six thousand and twenty-five dollars of the identical money, in the same papers in which she had received it two years before from C., having kept it intact. In January, 1897, Z. G. Co. and others, creditors of H., filed their amended bill, alleging that the six thousand and twenty-five dollars so returned to C. was the property of H., and as such liable to their debts, and praying that C. be required to pay it into court, and that it be applied to their debts against H. *Held*, that the circuit court did not err in dismissing said amended bill. (p. 318).

Appeal from Circuit Court, Barbour County.

Bill by the Zell Guano Company and others against Samuel J. Heatherly and others. A decree was entered, from which plaintiffs appeal.

Affirmed.

SAMUEL V. WOODS, for appellants.

W. T. ICE and DAYTON & DAYTON, for appellees.

MCWHORTER JUDGE:

Samuel J. Heatherly, having become involved in debt beyond his ability to pay out, on the 31st day of January, 1889, executed a deed of trust conveying all his lands and personal property to Melville Peck, in trust to secure the debts specifically set forth in the trust deed, among which was a debt of eight thousand one hundred dollars to J. N. B. Crim, as third in order of priority; the first being for taxes, and the second for purchase money on one of the tracts of land conveyed in the trust deed, for which there was also a vendor's lien. On the 2d of February, 1889, the Zell Guano Company instituted suit in the Circuit Court of Barbour County to set aside the said deed of trust as fraudulent and void as to the said debt to Crim of eight thousand, one hundred dollars, because said debt was alleged to be fictitious, and that said trust was made with intent to hinder, delay and defraud the plaintiffs and other creditors of said Heatherly. Said debt of Crim was made up, among other items, of six thousand five hundred dollars in cash loaned at time of execution of trust deed. At the hearing of the cause, the court held that the said trust deed was made with intent to hinder, delay, and defraud plaintiffs and other creditors, and was therefore fraudulent and void, and that the trustee, Peck, had full knowledge thereof at the time it was executed, and the same was set aside and held for naught; and upon appeal to the Supreme Court the same was reversed, in so far as it held that the trustee had notice of the fraud, and set aside the trust *in toto*, but it was held that it was made with fraudulent intent, and was void, as to the said debt of eight thousand one hundred dollars secured to Crim, which debt was remitted to the foot of the list of debts, and placed in a new class, No. 8, to be paid last in the order of priority. The Supreme Court found (38 W. Va., 409, 434, 18 S. E. 611) that the loan of six thousand five hundred dollars was fictitious, being only intended to help defendant Heatherly to put that much of his property beyond the reach of his

creditors; the identical money, in the same packages (except four hundred and seventy-five dollars), being returned to defendant Crim on the 8th of January, 1891. He contemplated, when it was loaned, that some of it should be used by Heatherly in satisfying certain liens against the property embraced in the deed of trust, but for some reason this purpose was not carried out; perhaps because, before all the money loaned was paid over to Heatherly, this suit assailing the deed of trust was instituted. The cause was remanded to the circuit court, and proceedings had therein whereby the land was sold, and sale confirmed by decree of May 23, 1896, in which the debts due to the creditors were decreed to be paid to them, and the question reserved for the future order of the court whether the said Crim should be required to pay into court for the benefit of the plaintiffs the said six thousand and twenty-five dollars, theretofore received by him on the 8th day of January, 1891, from Helen A. Heatherly.

At the January rules, 1897, the Zell Guano Company and other creditors of Heatherly filed their bill, praying that it be treated as an amended bill in the original cause, setting forth the whole transaction and the proceedings thereon and alleging that said six thousand and twenty-five dollars was the property of Samuel J. Heatherly; that it was in *custodia legis* at the time it was received by Crim from Mrs. Heatherly, on January 8, 1891, and that it was a trust fund, which the said Crim had no right to receive and apply upon a debt which was charged to be fraudulent, and was adjudged to be fraudulent and fictitious, and that the application thereof upon the said debt of eight thousand one hundred dollars was a flagrant disregard of the process of the court, and a contempt of its decrees and, in effect, allowed said Crim to have priority of payment upon the eight thousand one hundred dollar debt for six thousand and twenty-five dollars out of the estate of said Samuel J. Heatherly, and praying that said Crim be required to pay to plaintiffs so much of said sum of six thousand and twenty-five dollars, with interest thereon, as might be necessary to satisfy their several debts; that the said money so in his hands might be treated as a trust fund in the custody of the court, subject to its orders; and

that the application thereof sought to be made by the said Crim be set aside, and for general relief.

On the 27th day of February, 1897, the defendants J. N. B. Crim, Samuel J. Heatherly, and Helen A. Heatherly entered their demurrer to said amended bill, in which plaintiffs joined, and the demurrer, being argued, was sustained by the court, and the said bill was dismissed, and judgment rendered for defendants for their costs. On the 28th of April, 1897, plaintiffs caused notice in writing to be served on the defendants S. J. Heatherly, J. N. B. Crim, Helen J. Heatherly, wife of S. J. Heatherly, James E. Heatherly and M. Peck, trustee, reciting the decree of June —, 1896, ascertaining the amounts due them, respectively, on their claims, after the application of the proceeds of the sale of all real and personal property owned by said two Heatherlys, and that it was contended by the plaintiffs that a certain fund of six thousand and twenty-five dollars, received by said Crim during the progress of the suit, from the wife of Samuel J. Heatherly, was the property of said Samuel J. Heatherly, and was received by said Crim in fraud of the rights of his creditors, and that said fund, with interest thereon from January 8, 1891, constituted a trust fund in the hands of Crim, justly applicable in equity to the payment of plaintiffs' claims; and that by said decree of the 6th of June, 1895; and on the —day of June, 1896, the court reserved for future determination and decree all questions touching their right to compel Crim to pay said fund into court to be applied to the payment of their claims, as to which questions the said cause was still pending in said court, said questions undetermined, and their claims yet unpaid, although said fund in the hands of Crim was applicable to their relief, and they were notified that on the 29th of May, 1897, plaintiffs would move said circuit court of Barbour County, then in session, to decide and determine said reserved questions, and compel the said Crim, by a proper decree, to pay said fund, with interest, into court, to the relief of plaintiffs, together with costs in said suit. On the 4th day of June, 1897, the cause was heard upon the papers heretofore read; former orders and decrees; the amended bill and the decrees therein; upon the notice and motion of plaintiffs and as-

sailing creditors mentioned therein, to compel the defendant J. N. B. Crim to pay into court, to the relief of the assailing creditors mentioned in the said notice, the six thousand and twenty-five dollars, with interest thereon, obtained by said Crim from Helen A. Heatherly on the 8th of January, 1891, together with the costs of the original cause; and upon the demurrer of J. N. B. Crim, M. Peck, trustee, Samuel J. Heatherly, Helen A. Heatherly, and James E. Heatherly to the said notice; and upon argument of counsel,—when the court held that plaintiffs and assailing creditors mentioned in the notice were not entitled to the relief therein sought, and that said Crim was not liable to them, or any of them, for the said six thousand and twenty-five dollars, or the interest thereon, but that said Crim and Samuel J. Heatherly were liable to plaintiffs and assailing creditors for the costs of the original cause and petitions in that court, and decreed accordingly; from which decree the plaintiffs appealed to this Court, assigning the following errors: "First. It was error in the court below to refuse them relief or to pass on the question at the time as to their right to charge the \$6,025 by the decree of May 30, 1896, and to reserve the same for the future order of the court, when the pleadings were then made up, and the trust estate all sold and reported to the court, because in the meantime two years elapsed, and it was too late to appeal from that decree. Second. It was error in the court below to sustain a general demurrer, no grounds being assigned, to the amended bill, and to dismiss the same, denying them, and each of them, any and all relief as to their right to charge the \$6,025. Third. It was error in the court below to refuse them, and each of them, any and all relief in the original cause upon the notice given in respect to their right to have the \$6,025 brought into court and charged with their respective debts."

It is earnestly contended by appellants that, when this money (the six thousand and twenty-five dollars) was sent to Mrs. Heatherly, it became at once the property of Samuel J. Heatherly, and he could have used it as was contemplated by Crim when he let him have it. As stated in the opinion in 38 W. Va., 434 (18 S. E. 611): "He [Crim] contemplated that when it was loaned some of it should be

used by Heatherly in satisfying certain liens against the property embraced in the deed of trust, but for some reason this purpose was not carried out; perhaps because, before all the money loaned was paid over to defendant Heatherly, this suit assailing the deed of trust was instituted." Yet he did not use it in this or any other way, nor treat it as his own property, but kept it intact, and returned the identical money to Crim, which he received from him, in the same paper in which he received it, as shown by plaintiffs' amended bill and by the record. If the money had been so applied, under the decisions, such use of it would have redounded to the interest and benefit of the assailing creditors; and very properly so, because the payment by Crim would have been a voluntary payment, in furtherance of a fraudulent transaction, intended to defeat the creditors who were entitled to the benefit of all the property of the debtor, and Crim could not have been subrogated or substituted to the rights of such lien creditors, *Bank v. Wilson*, 25 W. Va., 242; *Fulleton v. Viall*, 42 How. Prac., 294. But it was not so applied, and can the creditors of Heatherly complain that it was not? The creditors being entitled to all the property that Heatherly owned, the transfer of it to prevent them having the benefit of the proceeds thereof was illegal and it was so held by the court, the trust deed was set aside, all the property sold, and the proceeds paid to the parties entitled to receive it. Crim was engaged with Heatherly in attempting to defraud his creditors. They were overtaken in their scheme. Their efforts came to naught. The property they were seeking to place beyond the reach of the creditors of Heatherly was all subjected to the debts for which it was liable, and Crim and Heatherly adjudged to pay the costs in undoing what they had vainly attempted to do, and the claim of Crim was removed from its place in the order of priority, and remitted to the foot of the list, to be last paid of all claims secured.

This case is different from any case cited by counsel for appellants (which I have carefully examined), or which I have been able to find, in that it is a contest over the thing itself, given in consideration of the execution of the fraudulent deed of trust, for its security, after the setting aside

as fraudulent of the trust deed and all the property conveyed in said trust deed has been disposed of and applied to the benefit of the just creditors. The cases cited go no further than to restore to the creditors the property attempted to be placed beyond their reach, or, in case it has gone into the hands of an innocent purchaser, its value. *Hinton v. Ellis*, 27 W. Va., 422; *Ringold v. Suiter*, 35 W. Va., 186, (13 S. E. 46). In *Baldwin v. June*, 68 Hun., 284 (Syl.), (22 N. Y. Sup. 852) it is held that "when a conveyance by a judgment debtor is set aside as in fraud of creditors, in an action in the nature of a creditors' bill, it should be retained as security to the grantee (although said grantee is affected with knowledge of the fraudulent intent with which it was executed) for so much of the consideration therefor as is represented by land conveyed to the grantor in exchange therefor, which, by reason of such conveyance to the judgment debtor, is made subject to, and the proceeds of which are applicable in satisfaction of, plaintiffs' judgment. Such security, however, is not to be extended to an antecedent indebtedness of the grantor to the grantee included in the consideration for the conveyance." In this opinion, the judge who rendered it says: "I am aware that it has been frequently held that payments made by a fraudulent vendee upon the purchase of property cannot be recovered back or be allowed to him in a judgment setting aside a conveyance which was fraudulent; that he, being a guilty participant in the fraud, was entitled to no relief from the court. But these decisions are founded upon the theory that the rights of the creditors would be impaired by the allowance of such payments.

* * * The refusal to reimburse for moneys paid in such a case is not for the purpose of punishing a party because of his wrongdoing, but is for the purpose of preserving the rights of the creditors to the extent that they would have been, had the conveyance not been made." In *Bank v. Halsted*, 134 N. Y. 520 (Syl.) (31 N. E. 900): "Where a transfer of personal property is set aside as fraudulent as against the creditors of the transferrer, in an action brought by them, and it appears that prior to the transfer the property was pledged to secure a valid debt to a party in no wise connected with the fraud, and that

the fraudulent transferee simply received the surplus of the avails of the sale of the property after deducting the amount of the debt, the creditors are not entitled to recover of him the full value of the property, but simply the value of the interest transferred, i. e. the value of the property, deducting the amount of the debt. However scandalous the fraud may be, a court of equity has no power to award judgment for a sum exceeding that value in order to punish the party for his wrongdoing."

In the case at bar it is insisted that not only the property fraudulently conveyed shall be restored to the pursuing creditors, as has been done, and the proceeds all applied to their debts, and Crim adjudged to pay the costs of their proceeding to set aside the trust deed, but that the money loaned by Crim to Heatherly, and secured by the trust deed, shall be forfeited to their benefit; thus not only having the benefit of all the property they were ever entitled to, to satisfy their debts as far as it would, but having their security increased by this sum of six thousand and twenty-five dollars, which came to the possession of Heatherly without consideration, which he never converted to his own use, and which never entered into or became a part of his estate. Suppose the court had required this sum to be paid into court, how could it have been disposed of? Surely, it could not have been paid out to the creditors of Heatherly, for they had already received the benefit of all his property, and they had no claim against Crim, after defeating his claim, to any interest in Heatherly's property; and the money having been placed in the hands of Heatherly by Crim in their fraudulent effort to place the property of Heatherly out of the reach of his creditors, and Heatherly not having converted it to his own use, but kept it intact, it was hardly a subject-matter to be disposed of by decree of the court. I see no error in the decree, and the same is affirmed.

Affirmed.

CHARLESTON.

ANDERSON v. HENRY *et al.*

Submitted June 18, 1898—Decided November 26, 1898.

1. LANDLORD AND TENANT—*Landlord's Lien—Rents—Priority of Liens—Distress Warrant.*

Section 12, chapter 93, Code 1891, gives a lien for one year's stipulated rent, whether accrued or not, upon the tenant's goods carried on the premises over liens created after the commencement of the tenant's term by deed of trust, mortgage, or otherwise, though no distress warrant has been issued for such rent. (p. 321).

2. DISTRESS WARRANT—*Return.*

A distress warrant, not being judicial process, need not be made returnable before a justice or court. If made returnable to the justice, it is good. (p. 323).

3. JUSTICE'S DOCKET—*Omission—Proof of Proceeding—Evidence.*

Where a justice's docket omits to enter a proceeding which should be entered other proper evidence may be admitted to prove the proceeding. (p. 325).

4. CONSTITUTIONAL LAW—*Rents—Distress Warrant.*

Amendment 14 of the Constitution of the United States does not render our statute law allowing distress warrant for rent unconstitutional and void. (p. 325).

Appeal from Circuit Court, Mercer County.

Bill by J. M. Anderson against Henry & Linkous to administer assets. Hannah Grinberg presented a claim. From a decree allowing only a part thereof, she appeals.

Reversed.

JOHNSTON & HALE, for appellant.

JOHN A. DOUGLASS and A. W. REYNOLDS, for appellees.

45	319
52	27
45	319
55	430

BRANNON, PRESIDENT:

A mercantile trading firm in the name of Henry & Linkous, by deed of lease dated April 18, 1894, leased of Hannah Grinberg a tenement in the city of Bluefield for a term of three years, beginning that date, for the sum of three thousand six hundred dollars payable in semiannual installments of six hundred dollars in advance, the first payable on the day of its date. On April 26, 1894, Goodman Bros. & Co. sued out an attachment for debt against Henry & Linkous, which was levied upon the stock of goods in the leased tenement, On April 27, 1894, Henry & Linkous made an assignment of said goods for the benefit of creditors. Under an order of court in the attachment case the goods were sold, and the proceeds are to be applied in this suit according to the rights of the parties. On July 23, 1894, Hannah Grinberg sued out from a justice a distress warrant against Henry & Linkous for the six hundred dollars installment of rent payable April 18, 1894, which was levied on said goods while yet on said premises. Afterwards J. M. Anderson, the trustee in said assignment for creditors, brought a suit in the circuit court of Mercer County, in equity, to administer the assets conveyed in said assignment among all parties interested therein; and in this suit a reference to a commissioner was made to convene the creditors of Henry & Linkous, and report their debts and priorities; and Hannah Grinberg presented to the commissioner a claim for one thousand two hundred dollars for one year's rent, and a decree in the case allowed her only six hundred dollars and refused it any priority, but ranked it among the general creditors' debts. From this decree she appealed. Thus the questions we have to decide are: How much is Hannah Grinberg entitled to for rent? Is it a lien because it is rent, and entitled to preference over the general creditors taking under the assignment? I answer that she is entitled, as against these creditors, to one thousand two hundred dollars,—one year's rent,—and that she has priority over said trust creditors. As against the tenants themselves, Hannah Grinberg would be entitled to demand, as it accrued, the entire sum of rent stipulated for the whole term; but as

against creditors of the lessees obtaining liens after the beginning of the term by deed of trust or otherwise against the goods on the premises, her rights are limited to one year's rent by sections 11, 12, chapter 93, Code 1891. Section 11 provides how a distress warrant shall be enforced, saying that it may be levied on goods of the lessee or his assignee on the premises, or removed therefrom not more than thirty days, and provides that liens resting on the goods when taken to the premises shall not defeat a levy of the distress warrant, but only the lessee's interest after paying the prior lien shall be liable to distress, but as to liens created while the goods are on the premises, they shall be liable to distress, but not for more than one year's rent, "whether it shall have accrued before or after the creation of the lien." The office of section 11 is to say what goods may be taken, and to say how the distress shall affect goods under liens prior and subsequent, limiting it, as to liens arising after the commencement of term, not by amount in dollars, but by the time of accrual, and to the amount stipulated to be paid for one year by the lease. So a distress warrant actually sued out could bind only for one year's rent actually accrued as against subsequent liens. More rent may have become payable, but as to the subsequent liens it could operate only for a year's rent; but its positive effect is to give a levy for one year's rent against subsequent liens, whether the rent accrued before or after the birth of the liens. The section gives no limit as to the tenant. Distress may, as to him, be for rent for a period longer than a year. This section shows a clear intent to give a landlord preference for one year's rent. Such is the law as to rent actually accrued and in arrear, where a distress warrant is out. But suppose a year's rent has not become due, so that there can be no distress. The term is running, the goods on the premises, and, if uninterrupted, the landlord would get his whole rent for the whole period; and the legislature thought that at least one year's rent should be accorded him, but no more, though the term were longer, as that would give the rent debt too much preference over other debts. Section 11 gives it to him where it has accrued; section 12 gives it to him whether accrued or not, because accruing under a

current tenancy. If the goods should remain on the premises, they would, when the rent should be due, be liable for one year's rent under a distress warrant in such case; and if any one under subsequent lien or legal process take the goods from the premises, and frustrate a distress warrant for the rent when due, this section places the landlord where he would be under section 11, giving him right to one year's rent; and that right is manifestly a preference. He must be paid, before removal under deed of trust, all rent in arrear, and secured what has not fallen due, not exceeding in all one year's rent. It gives the landlord right of payment and preference out of the goods themselves, and this operates as a lien. It gives right to the landlord to detain the goods on his premises against a removal under a trust until paid and secured as prescribed, just like an innkeeper or tailor may detain good until payment. If removed under legal process, it says that the officer, though he may remove them, shall out of the goods, pay rent in arrear, and sell enough on credit to pay the balance when due. Why all this is not a lien, I fail to see. It makes no difference whether a distress warrant has been sued out or not, or can be sued out, for want of maturity of the rent. Indeed, the section contemplated that a distress will not be made, if it does not prohibit it, because it allows the property to be removed from the premises under legal process, and does not contemplate a clash between that process and a distress,—a seizure out of the officer's hands by an officer under distress warrant subsequently issued, whether for rent due at the removal or afterwards becoming due. It dispenses with such warrant by commanding the officer removing the property under the process to pay the rent out of it. If levied on by a distress warrant before the levy of other process, I think there could be no removal under section 12, because, under section 11, the officer would complete the enforcement of his warrant; and so it is the office of section 12, without a distress warrant, and whether the rent is past due or not, to create a lien for rent for one year. This section, of its own force, gives a lien without a distress warrant. I think this view of the force of section 12 is sustained by *Wades v. Figgatt*, 75 Va., 575, holding that

goods carried on leased premises and incumbered after the commencement of the tenancy, "are charged with a definite portion of the rent arising under the tenancy during the term" against the incumbrance, and that is one year's stipulated rent, whether partly or wholly due or not. The Virginia statute there construed is the same as ours. Also, by the case of *City of Richmond v. Duesberry*, 27 Grat., 210, where the court said: "The landlord is protected by the statute against all deeds of trust, mortgages, and other liens where the lien has been created after the commencement of the tenancy, upon goods on the leased premises which belong to the person liable for the rent, and where there is an existing liability for rent in arrear, or to become due at the time the lien is created."

Another objection made against the rent demand is that the distress warrant for it was made returnable before the justice who issued it. Now, first, I have shown that section 12 makes this demand a lien without a warrant, for the whole one thousand two hundred dollars, part of it being due when the goods were removed from the premises under the attachment, and part afterwards falling due. But, second, the distress warrant need have no place of return, because it is not judicial process, and there need be—cannot be—a trial upon it. When a trial is to be had in a proceeding, process must have a time and place of return that such trial may be had then and there; but not so with a rent warrant. The form books give this warrant no return place. Mayo's Guide, 568; 4 Minor, Inst., 1619. At common law the landlord himself, without warrant, seized his tenant's goods, or some one authorized by him by his warrant. *Smith v. Ambler*, 1 Munf., 596; Tayl. Landl. & Ten. § 579; 2 Tuck., 11; Wood, Landl. & Ten., 940. By chapter 61, Acts 1834-35, in Virginia, this right of the lessor to make his own distress was abolished, and he was required to sue out a warrant from a justice upon affidavit. The act directed how it should be issued, upon what affidavit and to what officer directed, but did not say where or when returnable, but gave it "same force and effect as a like warrant issued by the lessor would have had prior to March 12, 1834," thus merely changing the source of the warrant from the lessor to a justice, leaving

it an *ex parte* proceeding, a mere warrant for the performance of a purely ministerial act, not a judicial proceeding. Our Code (chapter 93, section 10) directs about this warrant in several details, but does not provide when or where to be returned. This section is a law unto itself; and why, when it does not require a return day or place, and we know that it is a mere safe substitute for the warrant which before was issued by the landlord, should we overthrow a warrant for this cause, and add to the writ a requirement never before, in centuries, required? In some states this warrant by statute operates as a declaration in an action, but "at common law a distress for rent is not the commencement of a suit. It is a mandate authorized by law, to be issued in a proper case, to seize and sell the tenant's goods for the rent, just as if a judgment had been previously rendered therefor; and it is not returnable into any court, and, if returned into court, as other attachments, and judgment be rendered in that proceeding, the judgment will be void." 7 Enc. Pl. & Prac., 20. If, however, a place of return must be given, it can only be to the justice, under Code, c. 41, s. 7. Mr. Hutchinson makes the form in his treatise 668 so returnable.

Another reason against so doing is that no hearing upon the warrant takes place, as it is no suit between parties. At common law, if the tenant disputed the right of distress, he gave a replevin bond, and the landlord restored to the tenant his property, and the tenant brought action to test the validity of the distress, and, if he succeeded, retained the property. The action of replevin was abolished by the Code of 1849, and in its place the well-known forthcoming bond was applied to a distress warrant, as well as an execution, the effect of which is to let the tenant keep the property till a given day; and, if he fails to deliver it for sale, the landlord cannot again take it, but is driven to a motion or action on the bond, and in it the tenant can make "defense on the ground that the distress was for rent, not due in whole or in part, or was otherwise illegal." Code 1891, c. 142, ss. 1, 5; *Allen v. Hart*, 18 Grät., 726; 4 Minor, Inst., 139. If the tenant succeeds, he keeps the property. If he fails, he keeps it, but judgment goes on the bond. The tenant can only make defense to the dis-

trespass warrant by giving a forthcoming bond, and resisting award of execution upon it. He has just as efficient remedy as the common law gave. In fact, he is more favored, because by it his bond bound him to prosecute successfully an action of replevin, but now he has only to defend the other party's suit on the bond, which may never be brought. He could always—can now—bring trespass for wrongful distress, which he could not do, if the distress were a judicial proceeding.

It is urged that this proceeding is in violation of amendment 14 of the Constitution of the United States, guarantying due process of law. The remedy of distress existed before the discovery of America, and was brought to Virginia by Capt. Smith, and has never ceased; and it seems useless to argue to show that a remedy so long antedating said amendment, a remedy for and against all alike, is not destroyed by it. That amendment is not the "scarecrow" it is often represented to be; it does not overthrow state laws, rights and remedies, to the extent and purposes for which it is often cited. It respects the common law, the statute law, the remedies and procedure existing in the estat at its adoption. Cooley, Const. Lim., 434, note 1. It came to preserve, not to destroy, existing rights. Just as well say that the tax bill seizing a horse for taxes is not due process of law.

As to the objection that the justice's docket showed no entry of the proceeding, that docket only applies to civil or criminal suits before him where he renders judgment, as section 176, c. 50, Code, requiring this docket, says, "It shall be used exclusively for entering his judicial proceedings." As shown above, a distress warrant is not a suit or judicial proceeding. The warrant was filed, and fully proven. In fact, it proves itself. It might be easy to show, if necessary, that, if it ought to be entered in the docket, other evidence could be heard to prove it, where a docket is silent. 12 Am. & Eng. Enc. Law, 502. Code, c. 50, s. 182, makes the docket evidence, but not conclusive, and thus it is not exclusive evidence.

It is said there is no evidence that the first installment of six hundred dollars was not paid. There is evidence in the affidavit made to get the distress warrant,

which affidavit the statute makes evidence for this purpose. But no evidence is required. The undisputed lease under seal creates the debt, saying the six hundred dollars is to be paid on the 18th day of April, 1894, but not acknowledging its receipt. Besides, when once a debt exists, he who asserts payment must prove it; and there is not a scintilla of evidence to prove it. The decree is reversed and the cause remanded, with direction to enter a decree allowing Hannah Grinberg one thousand two hundred dollars with interest on six hundred dollars of it from 18th of April, 1894, and six hundred dollars of it from 18th of October, 1894, and to provide for its payment as a preferred demand over other debts out of the fund arising from said stock of goods.

Reversed.

CHARLESTON.

CUSHWA v. LAMAR.

Submitted June 18, 1898—Decided November 26, 1898.

1. SUPREME COURT OF APPEALS—*Jurisdiction—Municipal Council—Certiorari.*

This Court has appellate jurisdiction in all cases of *certiorari* awarded by the circuit court in review of matters and proceedings pending before or determined by a municipal council. (p. 328).

2. RETURN—*Certiorari—Waiver.*

Before hearing a case, matter, or proceeding removed by *certiorari* from an inferior tribunal the circuit court should require

a formal legal return thereto to be made by the officers to whom the same is directed, unless such return is waived by the parties to such case, matter, or proceeding. (p. 330).

3. *RECORD—Evidence—Bill of Exceptions—Review on Appeal.*

Evidence of witnesses heard by such inferior tribunal is not part of the record, unless made so by a proper order or bill of exceptions showing such evidence duly certified and authenticated. Where such is not the case, the circuit court cannot review the action of the inferior tribunal on its merits. (p. 331).

4. *CONTESTED ELECTION—Municipal Office—Notice of Contest.*

A notice of contest as to a municipal office which shows that the contestant was the opposing candidate for such office is not fatally defective in not showing that the contestant had the requisite statutory qualifications. The statute relating to contests for county and district offices makes this a matter of defense on the part of the contestee. (p. 332).

Error to Circuit Court, Berkeley County.

Contested election between Harry S. Cushwa and Charles M. Lamar. From a judgment for plaintiff, defendant brings error.

Reversed.

FLICK, WESTENHAVER & BAKER and FAULKNER & WALKER, for plaintiff in error.

U. S. G. PITZER and H. H. EMMERT, for defendant in error.

DENT, JUDGE:

On a writ of error to the judgment of the Circuit Court of Berkeley County in favor of Harry S. Cushwa against Charles M. Lamar, in a contested election case removed from the council of the town of Martinsburg by a writ of *certiorari*, the jurisdiction of this Court is objected to by the defendant.

There are two distinct classes of cases in which, according to the statutes of this State, *certiorari* is the proper remedy: (1) All that class of cases in which the writ was proper at common law; (2) civil cases wherein the writ is made a substitute for the writ of error. In the latter class this Court has no jurisdiction unless the amount in controversy exceed one hundred dollars, while in the former class jurisdiction is general, without regard to the amount

in controversy, by express provision of the Constitution, as amended in 1879, after the decision of the case of *Dryden v. Swinburn*, 15 W. Va., 234, was rendered. The law has been so settled by the holdings of this Court in the cases of *Cunningham v. Squires*, 2 W. Va., 422; *Dryden v. Swinburn*, 15 W. Va., 234; *Board v. Hopkins*, 19 W. Va., 84; *Farnsworth v. Railroad Co.*, 28 W. Va., 815, *Wilson v. Railroad Co.*, 38 W. Va., 212, (18 S. E. 577); *Town of Davis v. Davis*, 40 W. Va., 464, (21 S. E. 906). At common law *certiorari* was the proper remedy for reviewing contested election cases and other proceedings before municipal councils. 4 Enc. Pl. & Prac., 17. The statute is merely declarative of the common law, enlarging the writ, and substituting it generally for the writ of *quo warranto*, in similar cases. 1 Dill. Mun. Corp. § 202. Such being the nature of the writ, this Court has jurisdiction by writ of error to review the judgment of the circuit court.

The writ of *certiorari* awarded in this case on the petition of Charles M. Lamar was "directed to W. T. Henshaw, mayor, Stapleton C. Proctor, C. C. Lemem, Harry S. Cushwa, W. H. Wilen, G. D. Roberts, James Larkins, E. V. Little, John. Foley, C. Wesley Mann, and John Stunkle, members of said board of canvassers and common council of the corporation of Martinsburg, commanding them to certify in return to the judge of the circuit court of Berkeley County, West Virginia, at the court house thereof, on the 13th day of July, 1897, at 10 o'clock A. M., under the official seal or signature of the corporation, a complete record of all orders and proceedings held before them in reference to the count and the declaration of the result of the election for councilman in the Second ward of said corporation, which election was held on the 24th day of May, 1897, together with the sealed ballots which they either counted or refused to count, as set forth in said petition, and also described in the notice and counter notice of contest, together with the sealed packages of ballots, cast and voted at said Second ward, and the poll books and returns from said precinct, with all proper and authenticated evidence heard at the trial of said contest." A careful search of the record reveals no return to this writ. On the bottom of page 17 is the following state-

ment, presumably made by the clerk of the circuit court as a heading, but which cannot be considered as part of the record: "The following is a copy of all the papers and documents returned by the common council as the orders and proceedings held before the common council of the corporation of Martinsburg, acting both in the capacity of a canvassing board of the returns of the election for councilman of the Second ward of Martinsburg, held on the 24th day of May, 1897, and as a common council of said town, together with copies of the ballots either counted or refused to be counted by them, and a copy of the evidence heard at trial of the said contest." This is not signed by anybody, and is not an order of the court, and at most it can not be considered other than a mere certificate of the clerk. After it follows certain ballots; then the written evidence of certain witnesses, not authenticated in any manner, or by any person; then various orders and copies of proceedings of the council authenticated separately by the mayor and seal of the corporation. There is no connected record of the proceedings of the council, either filed with the petition or returned by the council or its officers, but a number of fragmentary papers thus appear in the record which the clerk of the circuit court certifies as aforesaid to be "papers and documents returned by the common council as the orders and proceedings held before the common council of the corporation of Martinsburg." On the 1st day of July, 1897, the court, in issuing a rule against the contestant, Harry S. Cushwa, made the following recital in its order: "The mayor and common council of the corporation of Martinsburg, in compliance with the order of *certiorari* entered by the court on the 1st day of July, 1897, made return of all the evidence and other papers and of their proceedings in the above-entitled cause." And on the 2d day of August, 1897, the court entered the following order: "This day came the parties by their attorneys, and it appearing to the court that the paper alleged to be evidence taken before the common council and placed in the hands of the clerk of this court on July 9th, 1897, by the clerk of the corporation of Martinsburg, has not been filed as a part of the return of the common council of the corporation of Martinsburg, in compliance with the order of the

1st day of July, 1897, it is ordered that the clerk of the court do mark the paper alleged to be evidence so produced, filed as of the 9th day of July, 1897." To these unauthenticated ballots and evidence being thus made and considered as part of the record the contestant objected, but the circuit court overruled his objection, and gave judgment against him. From this it appears that the only return made to the *certiorari* was that the clerk of the corporation made copies of certain proceedings of the council with the seal of the town and signature of the mayor attached, and then, together with the other papers mentioned, handed them to the clerk of the circuit court as a return to the *certiorari* and no written return properly authenticated and of sufficient legal formality was ever made or required by the circuit court. Herein all the confusion has arisen in this case. The circuit court, instead of requiring the record to be made up and returned by the lower tribunal, attempts to do so itself out of fragmentary papers handed to its clerk. The return should have been in writing, signed and sealed by the corporate authorities, containing a complete record of the contest so far as it appeared in the records of the council, and it should have contained a statement to the effect that all of the proceedings relative to the matters referred to in the writ were returned. 4 Enc. Pl. & Prac., 216, 217. In the case of *State v. St. John*, 47 Minn., 315, (50 N. W. 200), it was held: "Fragmentary and disordered sheets containing what may have possibly been evidence on the trial, but which are not certified to as such," will not be considered. The case of *Perryman v. Burgster*, 6 Port., 99, held: "A paper purporting to be a transcript, as a return to a *certiorari*, should not be received unless it be certified by the justice and return with the writ." "The return should not contain papers, proceedings, or affidavits which do not constitute a part of the record." If it does they will be regarded as surplusage, or be stricken out. 4 Enc. Pl. & Prac., 219. No proper return having been made to the writ, the circuit court should not have considered the case until one was made. This it had the right to require.

But could such return be now made which would be sufficient to authorize the circuit court to hear the

case on its merits? It appears from the transcript of the council's proceedings that the evidence was not made a part of the record by a proper bill of exceptions. There is presented in the record a lengthy paper purporting to be the testimony of certain witnesses examined before the council during the contest, but these are not made a part of the council's proceedings, nor signed or certified by any one, nor authenticated in any manner, except that the circuit court directs its clerk by its order of the 2d of August, 1897, to mark them as filed as of the 9th day of July, 1897. In the case of *Bee v. Seaman*, 36 W. Va., 381, (15 S. E. 173), this Court held that the record must be certified as it was at the time the writ was served. "It is then too late to make contemplated or intended certificates of fact and bills of exception part of such record, but it must be sent up as it is, without increase or diminution." If the lower tribunal cannot add to or take from its record after the writ issues, neither can the circuit court, by receiving and considering papers which are no part of such record. From this it clearly follows that the return can never be made or amended so as to give the circuit court jurisdiction to hear the case on its merits, for the reason that proper bills of exception, making the evidence and other papers parts of the record, were not prepared and properly authenticated. While a legal return was not made, it seems to be admitted on the part of the contestant that the notice and counter notice of contest and transcripts of the proceedings of the council are in the record properly. This requires this Court to pass on the sufficiency of the notice of contest. The objection thereto is that it does not show that the contestant was legally eligible to the office, if elected, and, as this is a mere question as to the number of votes received by each candidate, that, notwithstanding the contestee received a less number of votes, yet, so far as the notice shows, he would still be entitled to the office. JUDGE GREEN, in the case of *Dryden v. Swinburn*, 15 W. Va., 234; and JUDGE SNYDER, in the case of *Halstead v. Rader*, 27 W. Va., 806, both intimate that in a contest of this character the notice should show that the contestant, if successful, is entitled to the office. In what manner, or to what extent, neither of the judges show, but

leave it to be inferred that the statutory qualifications necessary to entitle the contestant to hold the office should be explicitly set forth. Turning to McCrary on Elections (section 431), we find the law stated to be, as a general rule, "that statutes provided for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections;" and in section 434, "where the statute provides that the election of a public officer may be contested by 'any candidate or elector,' the person instituting such contest must aver that he is an elector, or he was a candidate for the office in question." In Paine on Elections (section 829) the law is stated to be: "It is not necessary to aver in a complaint or notice of contest that the relator or contestant possessed the requisite qualifications for the office. That is to be presumed until the contrary is averred and proved by the defendant." *People v. Ryder*, 16 Barb., 370. In 6 Am. & Eng. Enc. Law, 405, the law is said to be, "The statement of contestant's right to make the contest should appear, but it is not necessary to state that he was eligible where the notice shows he was a candidate, although this might be required in an information," referring to *Ledbetter v. Hall*, 62 Mo., 422, and *Rounds v. Smart*, 71 Me., 380. These decisions are to the effect that, unless the statute so requires, it is not necessary for the notice to contain averments of the contestant's eligibility to the office.

There is no statutory provision directing how contests for municipal offices shall be carried on, this probably being left for the council of the municipality to provide by ordinance. In the absence of other provision, the law regulating contests for county and district offices was followed, which is section 1, chapter 6, Code 1891: "A person intending to contest the election of another to any county or district office shall, within ten days after the result of the election is declared, give him notice in writing of such intention and a list of the votes he will dispute, with the objections to each, and of the votes rejected for which he will contend. If the contestant object to the legality of the election or the qualification of the person re-

turned as elected, the notice shall set forth the facts on which such objection is founded. The person whose election is so contested shall within ten days after receiving such notice deliver to the contestant a like list of the votes he will dispute, with his objections to each, and of the rejected votes for which he will contend, and if he has any objection to the qualification of the contestant, he shall specify in writing the facts on which the objection is founded." This statute undoubtedly recognizes the presumption of law that the contestant, being a candidate, is eligible to the office for which he contests, and throws on the contestee the burden of both alleging and proving his disqualification. This is undoubtedly consonant with reason, for it is not to be presumed that a disqualified person would be a candidate for an office which he could not hold if elected. And therefore the burden is placed on the contestee relying on such disqualification to allege and prove the same, thus simplifying election contests in furtherance of public interest, and narrowing them to the real question of importance or dispute between the parties thereto. Having reached the conclusion that no proper return was ever made to the writ of *certiorari*, that such return could not now be made so as to allow a review of the contest proceedings on its merits for want of proper bills of exception, and that the notice of contest, with affidavit thereto, is sufficient in form and substance, the judgment of the circuit court must be reversed, and the *certiorari* dismissed as improvidently awarded.

Reversed.

45	334
54	198
45	334
59	493
59	611
45	334
63	458
45	334
66	740

CHARLESTON.

GIBNEY *et al.* v. FITZSIMMONS *et al.*

Submitted June 3, 1898—Decided November 26, 1898.

1. DEED—*Construction—Intent of Parties.*

The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same, and, when this is determined, effect will be given thereto, unless to do so will violate some established rule of property. (p. 342).

2. DEED—*Description—Intent of Parties.*

Where the description consists of several parts, and some of them are incorrect, if it can be ascertained from those which are correct what was intended to be conveyed, the incorrect parts will be rejected, and the instrument be made to take effect. (p. 342).

3. DEED—*Ambiguity—Intent of Parties—Subsequent Acts.*

If the language of a deed is ambiguous, the court, in order to arrive at the intention of the parties, may look at their subsequent acts, and the manner in which the thing granted has been used and enjoyed under the grant. (p. 343).

Appeal from Circuit Court, Ohio County.

Bill by Eda Gibney and others against James Fitzsimmons and others. Decree for complainants. Defendants appeal.

Affirmed.

WHITE & ALLEN, for appellants.

HOWARD & HANDLAN and T. S. RILEY, for appellees.

MCWHORTER, JUDGE:

James Fitzsimmons and Mary Gibney purchased to-

gether a piece of real estate in the city of Wheeling, under the following contract: "Wheeling, July 18, 1864. Mr. Fitzsimmons and Mrs. Mary Gibney have this day purchased from Mrs. Mary Anne Fitzpatrick Powell the house and lot northeast corner of Zane and Seventh streets, for the sum of six hundred dollars, and on the following conditions, to which all parties subscribe: Two hundred dollars to be paid forthwith, and the balance in annual sums of two hundred dollars, with interest at six per cent.; the deed to be transmitted to the purchasers after they shall have paid in full. Hiram D. Powell, Mary A. Powell." The premises so purchased consisted of a lot designated as "lot 157," fronting sixty feet on Zane street, and 50 feet on Seventh street. Upon the corner fronting Zane street was a double frame house, thirty feet wide. At the time of the purchase, Mrs. Mary Gibney was occupying the west or corner half of the house as a residence, and continued to so occupy it until 1874; and, when she left it, she kept tenants in it, and collected the rents, until her death, in 1892; and, soon after the purchase, Fitzsimmons, with his family, moved into and occupied the east half of the house, and so continued to occupy it until about the year 1874, when he built a brick house on the east half of the lot, and moved into that, where he has remained ever since, and has continued to occupy the east half of the said frame house by tenant, collecting the rents, ever since. On the 17th day of August, 1866, the grantors, Hiram D. Powell and Mary A. Powell, undertook to convey to said Mary Gibney and James Fitzsimmons, by two separate deeds, their respective portions of said property, which deeds both bear date on said 17th of August, 1866, and were duly acknowledged and recorded on the 22d day of the same month. One of said deeds conveyed to Mary Gibney, in trust for her son John A. Gibney, "that part of lot No. (157) one hundred and fifty-seven now occupied by the said Mary Gibney, party of the second part, and fronting on Zane street thirty feet, commencing at James Fitzsimmons' line, and running thence westward to Seventh street, and running from Zane street to Arthur McGinness' line a distance of fifty (50) feet, together with the tenement house situated

thereon." The other conveyed to James Fitzsimmons, in trust for his wife, Mary Fitzsimmons, "that part of lot No. one hundred and fifty seven (157) now occupied by the said James Fitzsimmons, party of the second part, and fronting on Zane street thirty (30) feet, commencing at Mary Gibney's line, and running thence eastward, and running from Zane street to Arthur McGinness' line, a distance of fifty (50) feet, together with one-half of tenement house situated thereon."

John A. Gibney died in the summer of 1891, and Mary Gibney in October, 1892. Eda Gibney, widow, and Margaret A. Gibney, and other heirs at law of John A. Gibney, deceased, filed their bill at March rules, 1894, in the circuit court of Ohio County, against James Fitzsimmons and Mary Fitzsimmons, his wife, praying that the court appoint a discreet person as trustee in the room and place of said Mary Gibney, deceased, under said trust deed, and that said trustee, when so appointed, be directed to convey the property to plaintiffs, and that defendant James Fitzsimmons be held to account for the rents collected by him for the property since the death of said Mary Gibney, and that he be directed to interfere no further with the rights and interests of plaintiffs in the property, and that he be required to turn over the possession of said property to said trustee. And at March rules, 1895, said plaintiffs filed their amended bill, besides the said James and Mary Fitzsimmons making all the heirs at law of Mary Gibney parties defendants, containing about the same prayer as the original bill, and that the rights and interests of the plaintiffs in the premises, and of the said trustee who might be so appointed, might be clearly fixed and defined by the court, so that the said James Fitzsimmons might be deterred and stopped from further interference with them or the property, and for general relief. James and Mary Fitzsimmons, Bridget Lantry and her husband, Catherine Gribben and her husband, the adult defendants, filed their joint answer, denying the material allegations of the bill; that Mary Gibney, either in her own right or as trustee of John A. Gibney, ever owned or occupied or claimed the whole of the property, or until the filing of the bill had they, or any one

claiming under them, claimed or pretended to claim more than the part of lot 157 upon which the west half of the double house is situated, and extending back the width of the west half of the double frame house from Zane to Seventh street, along the east line of Seventh or Wood street, fifty feet to the McGinness property; and averring that, at the time of the purchase, each took possession, Mary Gibney on the west, and Fitzsimmons on the east, of said line; that the west fifteen feet, on the corner, of which Mary Gibney took possession, was more valuable than the east forty-five feet of said lot, of which the said Fitzsimmons took possession; that, during all the time from the purchase, all the parties, as well as Mary Gibney and John A. Gibney, well knew and understood the line to be as described, and that the Fitzsimmonses occupied the said east forty-five feet by right of their ownership thereof, and not, as alleged in the amended bill, with the assent and permission of said John A. Gibney or any other person, and that respondents, had no knowledge of plaintiffs' claim until the filing of the bill; that from the time of the purchase, in 1864, until the present, the said James and Mary Fitzsimmons had had the open, notorious, continuous, uninterrupted, and undisputed possession of said property to said line, and paid the taxes thereon; that they not only claimed it under their deed but their claim and right thereto was never disputed by said Mary Gibney or John A. Gibney, or any one claiming under them. Respondents aver that in the deeds from Powell and wife, of August 17, 1866, there is a material mistake in the description of the property in the deed to James Fitzsimmons, in that the distance call on Zane street is thirty feet, while it should be a much greater distance; that the mistake is shown on the face of the deed, as the deed calls for the property "now occupied by the said James Fitzsimmons," and, in further describing the property, says, "together with one-half of tenement house situated thereon," clearly showing that the one-half of the tenement house occupied by said Fitzsimmons was and still is on the part of said lot No. 157 conveyed to said James Fitzsimmons; that a like mistake appears in the deed under which the plaintiffs claim; that said deed conveyssuch part of lot No. 157 as was occupied by

Mary Gídney at the time said deed was made, and conveys therewith a frame tenement house situated thereon, and calls for the line of said James Fitzsimmons, showing that it was the intention, both implied and express, in said deed, that the line between the double frame houses extended was the dividing line between the said properties, and that the use of the words "thirty feet" in said deed was a mistake and error therein, which should be reformed and corrected.

Respondents deny that the property was conveyed in trust to the said Mary Gibney for her son John A. Gibney, and aver that it was purchased and improved by said Mary with her own money, and that she used, occupied, and rented it, and received the rents and profits therefrom from the time of the purchase, in 1864, until the time of her death, in 1892; that said John A. Gibney never invested a dollar in the property, or had anything to do with it, and made no claim during his life or the life of said Mary that said property was held in trust for him, and that respondents never heard of such claim until about the time of the bringing of this suit; that the deed to said Mary is in the handwriting of said John A. Gibney, and that both grantors and grantee Mary Gibney were uneducated, and could not read writing; "that said Mary Gibney did not know during her lifetime that the words 'in trust for John A. Gibney' were in said deed; that no effort was made by the said John A. Gibney during his lifetime to enforce or even claim any interest in said property, and that said words were inserted in said deed either by accident or mistake, or in fraud of the right of the said Mary Gibney." Respondents aver that said property was owned in fee by said Mary Gibney, and at her death descended to her heirs at law, as follows: One-fifth to the plaintiffs, one-fifth to respondent Mary Fitzsimmons, one-fifth to Bridget Lantry, one-fifth to Catherine Gribben, and one-fifth to the husband and children of Rose (Gibney) Oshe, deceased; and that said property should be partitioned and divided among said heirs at law; and they pray for affirmative relief,—that said line may be fixed and established along the line between said double frame house extended to the northern boundary of the lot: that the deed to Mary Gibney be construed in the light of

these facts and the evidence offered, and be held to be a deed in fee, and that the said Mary Gibney held the property in fee under said conveyance; and that same be partitioned and divided among said heirs at law, or sold, and the proceeds divided. Plaintiffs filed their special replication, traversing the material averments of the answer. The answer of the infant defendants was filed by their guardian *ad litem*.

Depositions were taken and filed in the cause. On the 5th of June, 1896, the cause was heard, when the court ascertained "that Mary Gibney and James Fitzsimmons, on July 18, 1864, purchased a part of lot 157, on the northeast corner of Zane and Seventh streets, consisting of 60 feet frontage on Zane street, and extending back along Seventh street, 50 feet, upon which was situated a double frame house; that under said purchase Mary Gibney took possession of the west half of said double frame house and the ground belonging thereto, fronting 15 feet on Zane street, and extending back the same width 50 feet along Seventh street, and that James Fitzsimmons took possession of the east half of said double frame house, and the balance of the ground fronting 45 feet on Zane street, and extending back 50 feet to the McGinness line, and that such possessions have ever since been undisturbed and continuous; that on the 17th of August, 1866, Hiram D. Powell and wife conveyed to each of them the respective parts so occupied by deeds, which are filed in this cause as Exhibit A of Eda Gibney's deposition, and Exhibit A of answer of James Fitzsimmons and others, and that the clause in each of said deeds, 'fronting on Zane street thirty feet,' when construed with the balance of the respective deeds, and the surrounding circumstances at the time of the execution of the same, and the acts of the parties under said deeds, should be made to conform to such occupancy; that the description of the property in the said deed to Mary Gibney is as follows: That part of lot No. (157) one hundred and fifty-seven now occupied by the said Mary Gibney, party of the second part, and fronting on Zane street thirty feet, commencing at James Fitzsimmons' line, and running thence westward to Seventh street, and running from Zane street to Arthur McGinness' line, a distance of fifty

feet, together with the tenement house situated thereon, it being part of the lot or parcel of ground conveyed to Dennie Fitzpatrick by Jno. Ritchie, Craig Ritchie, Ellen Ritchie, and Mary Anne C. Ritchie, by deed bearing date the 1st day of April, eighteen hundred and thirty-seven.' It is therefore adjudged, ordered, and decreed by the court that the said deed of Hiram D. Powell and wife to the said Mary Gibney be reformed and corrected so that the description therein of the property thereby conveyed will read as follows: 'That part of lot (157) one hundred and fifty-seven now occupied by the said Mary Gibney, party of the second part, and fronting on Zane street fifteen feet, commencing at James Fitzsimmons' line, and running thence westward to Seventh street to Arthur McGinness' line, a distance of fifty feet, together with the tenement house situated thereon; it being part of the lot or parcel of ground conveyed to Dennie Fitzpatrick by Jno. Ritchie, Craig Ritchie, Ellen Ritchie, and Mary Anne C. Ritchie, by deed bearing date the first day of April (37,18) one thousand eight hundred and thirty-seven.' And the court is further of the opinion that the said Mary Gibney died seised and possessed of the fee-simple estate in and to the above-described parcel of land, notwithstanding the provision 'in trust for her son John A. Gibney,' contained in said deed, and that the same, upon her death, descended to her heirs at law. It is therefore further adjudged, ordered, and decreed by the court that the relief prayed for by the plaintiffs cannot be granted, viz. 'that a trustee be appointed in the room and instead of the said Mary Gibney as trustee in and under said deed, and that said trustee so appointed may be directed to convey the said property to the plaintiffs by deed.' And the plaintiffs not asking or desiring a decree against the defendant James Fitzsimmons for an account for rents, issues, and profits received by him from or on account of the said part of lot No. 157 fronting on what was formerly Zane, now Seventeenth street, fifteen feet, and running from Seventeenth street to what was formerly Arthur McGinness' line, a distance of fifty feet, and the tenement house situated thereon, the prayer of the bill for an account is therefore refused, but without prejudice to the rights of the plaintiffs to insti-

tute any proper action, suit, or proceeding for an account; and, none of the defendants asking any further decree, it is therefore adjudged, ordered, and decreed by the court that the defendants recover from the plaintiffs their costs by them about their defense expended."

From this decree the appellants obtained an appeal to this Court, and assign the following errors: "(1) That the court erred in changing the description of the property different from and inconsistent with the intention of the parties, expressed in the deed which has been regularly executed to Mrs. Mary Gibney. (2) That the court erred in making a deed by its decree. (3) That the court erred in wiping out by its said decree the trust contained in the said deed to Mary Gibney. (4) That the court erred in its opinion, as expressed in the said decree, that Mary Gibney died seised and possessed in fee simple in and to the land conveyed by said deed, 'notwithstanding the provision in trust for her son John A. Gibney,' contained in said deed. (5) That the court erred in deciding that the said property, upon the death of the said Mary Gibney, descended to her heirs at law; that the court erred in giving to the defendants Fitzsimmons, by its said decree, forty-five by fifty feet of the said land conveyed by the two deeds exhibited with the pleadings in this suit, and the east fifteen feet of the house which was upon the land when it was purchased. (6) That the court erred in deciding that said Mary Gibney, was only entitled to fifteen by fifty feet of the ground, and the west fifteen feet of the house. (7) That the court erred in not appointing a trustee under the said deed in the room of the said Mary Gibney, as prayed for in the bill. (8) That the court erred in decreeing that any other than the plaintiffs in the cause were entitled to any interest in the part of the said land and the house which was conveyed to Mary Gibney."

The circuit court properly took the view that its business was in this cause to construe the two deeds dated August 17, 1866, made by H. Powell and wife to Mary Gibney and James Fitzsimmons, respectively. 1 Warv. Vend. c. 13, § 1, says: "It is a fundamental rule in the construction of deeds that effect must be given to the intent of the parties when it is plainly and clearly expressed, or can be

collected or ascertained from the instrument, and is not repugnant to any rule or law." In *Hurst v. Hurst*, 7 W. Va., 289, 299, JUDGE HAYMOND says: "When the language used is susceptible of more than one interpretation, it has been held that courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject-matter of the instrument; and sometimes, when the words are ambiguous, the court will call in aid the acts done under it, as a clew to the intention of the parties." *Caperton's Adm'rs v. Caperton's Heirs*, 36 W. Va., 479, (15 S. E. 257), (Syl. point 3). Also in *French v. Carhart*, 1 N. Y., 96, it is held that, "if the language of a deed is ambiguous, the court, in order to arrive at the intention of the parties, may look at their subsequent acts, and the manner in which the thing granted has been used and enjoyed under the grant." *Kinney v. Hooker*, 65 Vt., 333, (26 Atl. 690): "If a grant is ambiguous, the circumstances surrounding it and the situation of the parties are to be considered in construing it." In *Lehndorf v. Cope*, 122 Ill., 317, (Syl. point 2), (13 N. E. 505): "The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same, and, when this is determined, effect will be given thereto accordingly, unless to do so will violate some established rule of property." "In cases where the language used by the parties to an instrument is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation put upon it by the parties themselves, as shown by their acts and conduct, is entitled to great, if not controlling, weight." 11 Am. & Eng. Enc. Law, 518; *District of Columbia v. Gallaher*, 124 U. S., 505, (8 Sup. Ct. 585); *Topliff v. Topliff*, 122 U. S., 121, (7 Sup. Ct. 1057); *Railroad Co. v. Trimble*, 10 Wall., 357; *Knick v. Knick*, 75 Va., 12. In *Johnson v. Simpson*, 36 N. H., 91, at page 94, it is said: "Where the description consists of several parts, and some of them are incorrect, if it can be ascertained from those which are correct what was intended to be conveyed, the incorrect parts will be rejected, and the instrument be made to take effect." And *Adams v. Alkire*, 21 W. Va., 480: "Where two clauses are irreconcilably repugnant, in

a deed the first, and in a will the last, prevails." 2 Minor, Inst. (4th Ed.) 1059; *Blair v. Muse*, 83 Va., 238, (2 S. E. 31.)

The first part of the granting clause in each deed, descriptive of the property granted, is to Mary Gibney "that part of lot No. 157 now occupied by the said Mary Gibney," and to James Fitzsimmons "that part of lot No. 157 now occupied by the said James Fitzsimmons." The first is further described as "fronting thirty feet on Zane street, commencing at James Fitzsimmons' line and running thence westward to Seventh street, and running from Zane street to Arthur McGinness' line a distance of fifty feet, together with the tenement house situated thereon;" the second further described as "fronting thirty feet on Zane street, commencing at Mary Gibney's line, and running thence eastward, and running from Zane street to Arthur McGinness' line a distance of fifty feet, together with one-half of tenement house situated thereon." The tenement house is situated on the corner, and covers thirty feet front on Zane street, all of which house, according to the literal reading of the deed to Mrs. Gibney, is conveyed to her, and one-half of which, according to the other deed, is conveyed to Fitzsimmons. Both deeds are dated the same day, and both acknowledged and recorded on the same day, but another than the date. The evidence clearly shows that, at the time of making the deeds, Mary Gibney was in possession of, and occupied, fifteen feet fronting on Zane street, and running back with Seventh street the same width with the center of the double house, and that James Fitzsimmons was in possession of, and occupied, the residue of the lot fronting forty-five feet on Zane street, and running back, the western line, with the middle of the said double frame house fifty feet, to the McGinness property.

After thoroughly reviewing the evidence, I have adopted the following views of Judge Paull, of the circuit court, expressed in his decision of the case:

"Now, the evidence in this case shows that lot No. 157, which is situated at the northeast corner of Zane and Seventh streets, in the City of Wheeling, and has a frontage of sixty feet on the former, and fifty on the latter, street, was purchased by Mary Gibney and James Fitz-

simmons, jointly, from Hiram D. Powell and wife, on July 18, 1864, for \$600; that upon the payment of this sum in full, one-half thereof being paid by each purchaser, the deeds aforesaid were executed; that at this time the eastern thirty feet of the said lot was vacant, and consisted largely of an embankment six or seven feet high, but that on the western thirty feet thereof there was located a double frame dwelling house, the western half of which was occupied by Mary Gibney, and the eastern half, including the eastern thirty feet of the lot, by James Fitzsimmons; that the property continued to be so occupied until about 1874, when the latter, having graded the eastern thirty feet of the said lot, and built a two-story brick dwelling thereon, moved into the same, where he has since resided, and the former moved to Zanesville, Ohio, where she resided until 1889, when she returned, and made her home with the said James, who was her son-in-law, until her death, which occurred in 1892; that the said James, from the time he moved out of the eastern half of the double frame house, in 1874, until the present, has continuously rented the same, collected and appropriated to his own use the rents, kept the building in repair, and paid the taxes assessed thereon; and that his right so to do was not questioned by anyone until a short time before the bringing of this suit. The evidence also shows that, at the time when the deeds aforesaid were executed, the western fifteen feet of the lot were worth more than the eastern forty-five feet, that, about the same time, the joint purchasers of the lot expended jointly the sum of six hundred and sixty dollars in repairing and improving the double frame house aforesaid; that the deeds were written by John A. Gibney, son of Mary Gibney, who was then a school boy, nineteen years of age; and that neither Mary Gibney nor James Fitzsimmons can or could read writing.

"The facts above detailed clearly warrant the conclusion, it seems to me, that the parties to the deeds under consideration intended thereby to convey to Mary Gibney and James Fitzsimmons the particular parts of lot No. 157 that they were occupying, respectively, at the time when the deeds were executed; that is to say, to the former the western fifteen feet and to the latter the eastern

forty-five feet thereof. And this intention can be effectuated without violating any rule of law, as will be seen from an examination of the authorities before cited, by rejecting all of the descriptive clauses contained in each deed, except the first, which designates the property conveyed as that 'now occupied' by the grantee. The deed to Mary Gibney for her interest in this property purports to convey the same to her 'in trust for her son John A. Gibney.' The evidence, however, shows that John A. Gibney never invested one dollar in the property; that Mary never knew until some ten years or more before the bringing of this suit that the deed had been made in that form; that she then repudiated the trust, and so notified her son John; that, from the date of the execution of the deed until her death, Mary Gibney was in possession of the property, either in person or by tenants, as owner, improving and taking to her own use the rents and profits thereof, and otherwise exercising over it such acts of ownership as manifested unequivocally an intention to ignore and repudiate any rights that John or any one else might claim therein. Under these circumstances, it must also be held that Mary Gibney's possession of this property was from its commencement, under the deed aforesaid, adverse to the rights of John Gibney. *Cooley v. Porter*, 22 W. Va., 121, 127, 128; *Jones v. Lemon*, 26 W. Va., 629; *Stillwell v. Leavy*, 84 Ky., 379, (1 S. W. 590)."

It is insisted by appellants that, by a fair construction of the deed to Fitzsimmons, no part of the tenement house is conveyed to him; that the words "together with one-half of tenement house situated thereon," are parenthetical, and simply descriptive of what Fitzsimmons was occupying; and that, considering the two deeds together, there could not possibly be a more reasonable construction put upon it than that meaning. It is impossible, it seems to me, for an unbiased mind to read the deed to Fitzsimmons and come to the conclusion that it was not intended to include in the grant the one-half of the tenement house. The grant is of "the following described property: * * * That part of lot 157 now occupied by the said James Fitzsimmons, party of the second part, and fronting on Zane street thirty feet, commencing at Mary Gibney's line, and

running thence eastward, and running from Zane street to Arthur McGinness' line a distance of fifty feet, together with one-half of tenement house situated thereon." Appellants, for the purpose of their construction, take the words "together with one-half of tenement house situated thereon" from their setting, where they can only be construed to mean a part of the grant, and place them as follows: "That part of lot No. 157 which (together with one-half of tenement house situated on said lot) is now occupied by the said James Fitzsimmons," etc., and gravely ask a court of equity to so construe the deed; and this, in the face of abundant proof that at the time of the purchase, in 1864, the east thirty feet were hardly considered worth anything, and that the corner fifteen feet, with the half of the house occupied by Mary Gibney, were more valuable than the east forty-five feet, including the half of the house.

Appellants contend that the trust is express in favor of John A. Gibney, and "that there is no rule of law or equity that can destroy this express trust, and transfer the beneficial ownership from the son to the mother, and there is no statute of limitation that can aid the appellees," and cite *Lockhard v. Beckley*, 10 W. Va., 87, in support of the first proposition, and *Gapen v. Gapen*, 41 W. Va., 422, (23 S. E. 579), in support of the latter. In the last-mentioned case (point 3 of syllabus) it is held that "no statute of limitations runs against an express trust, nor does lapse of time avail, until the duties are ended or the trust disavowed." In the case at bar, when the fact first came to the notice of the trustee, she was very indignant, disavowed the trust in the most emphatic terms, and always claimed and enjoyed the property as her own as long as she lived, and, when not occupying it as a residence, collected and enjoyed the rents and profits.

For the reasons herein stated, I find no error in the decree of the circuit court, and it is affirmed.

Affirmed.

CHARLESTON.

JARVIS v. MARTIN'S ADMINISTRATOR *et al.*45 347
48 452

Submitted June 6, 1898—Decided November 26, 1898.

1. BILL IN EQUITY—*Demurrer—Stale Demand—Dismissal.*

"The defenses of the statute of limitations and laches and stale demand" being proper grounds for demurrer, a bill setting up a stale demand, without alleging any reasonable excuse for delay in the assertion thereof, should be dismissed for want of equity, unless properly amended. (p. 348).

2. PRESUMPTION OF PAYMENT—*Lapse of Time—Bill in Equity—Stale Demand.*

Where the presumption of payment arises by reason of the lapse of twenty years' time, a bill seeking enforcement of such stale demand must set up facts and circumstances sufficient to rebut such presumption, or it will be demurrable. *Jackson v. Hull*, 21 W. Va., 601. (p. 348).

Appeal from Circuit Court, Harrison County.

Suit by Lemuel D. Jarvis against Jesse V. Martin's administrator and others. Judgment for plaintiff. Defendants appeal.

Reversed.

CLIFFORD & SPERRY, for appellants.

JOHN BASSEL, for appellee.

DENT, JUDGE:

L. D. Jarvis filed a bill in chancery against Jesse V. Martin and others in the circuit court of Harrison County, at April rules, 1894, seeking to enforce a vendor's lien retained in a certain deed executed by Edwin Maxwell and Burton Despard, trustees, to Jesse V. Martin, bearing date

the 4th day of March, 1871. Before appearance therein, Jesse V. Martin died, and the suit was revived against his administrator and his devisees, some of whom were infants. By the final order it appears that Hugh Martin, a party in his own right as administrator, and Ettie Martin, the only other adult devisee, demurred to the bill, and their demurrer was overruled. They also filed a joint answer, relying on the statute of limitations, laches, and presumption of payment by reason of the lapse of upward of twenty years' time. The note given for the purchase money had long been barred, and twenty-three years had elapsed from the date of the deed until suit was brought. This all appears on the face of the bill, and there is no reason or excuse alleged why the suit was not sooner instituted. In the case of *Thompson v. Iron Co.*, 41 W. Va., 574, (23 S. E. 795, Syl. point 5), this Court held the settled law of this State to be that "the defenses of the statute of limitations and laches and stale demand may be made by demurrer." Such being the case, it devolves upon the plaintiff who seeks the enforcement of a stale demand to allege such facts as will entitle him to the aid of a court of equity; otherwise, relief will be denied him. His claim, having been rendered inequitable by lapse of time, will be regarded as no claim at all, in the absence of reasonable excuse for the nonassertion thereof. *Jackson v. Hull*, 21 W. Va. 601.

For the foregoing reasons, the decree is reversed, and the demurrer of Hugh M. Martin and Ettie Martin is sustained, and the cause is remanded, with leave to the plaintiff to amend his bill if he desires to do so; otherwise to be dismissed.

Reversed.

CHARLESTON.

KYLE *et al.* v. WAGNER *et al.*

Submitted September 13, 1898—Decided November 26, 1898.

1. CORPORATIONS—*Board of Directors—Assignment for Benefit of Creditors—Stockholders.*

The directors of a corporation in this State have no power to direct the assignment of the entire property owned by such corporation to a trustee for the payment of its creditors, without the consent of the stockholders. (p 353).

2. CORPORATIONS—*Suits Against Officers—Parties.*

Where suit in equity is brought by certain stockholders against the directors, and such directors, the president and all the stockholders are before the court, it is unnecessary to make the corporation a party by name, the object of the suit being to protect the interest of the stockholders from the unauthorized acts of the directors. (p. 351).

Appeal from Circuit Court, Ohio County.

Bill by Robert W. Kyle and others against Edward Wagner and others. Decree for defendants, and plaintiffs appeal.

Reversed.

JOHN J. CONIFF, for appellants.

T. S. RILEY, and HOWARD & HANDLAN, for appellees.

ENGLISH, JUDGE:

On the 10th day of January, 1898, the Wood Bros. Planing-Mill Company, a corporation duly incorporated and organized under the laws of the State of West Virginia, by

that he would not complete one, and was attempting to sell the contract for erecting two dwelling houses, all of which possession and control was to the exclusion of the stockholders, and, if not restrained, he would dispose of and sell all of said corporation's property. It is perceived that the acts complained of amount to an entire winding up of the affairs of said corporation, without consultation with or consent of the stockholders, which would surely be regarded as irreparable injury if the stockholders desired to continue business; and we do not consider this ground of demurrer well taken.

The injunction in this case was awarded upon the further ground that the assignment was directed at an illegal meeting by the directors, when one of their number was absent, and had no notice of the meeting; and, although it appears that their action was ratified by a subsequent directors meeting, the question is whether, if the first meeting of directors had been legal and proper in all respects, said directors had the power, under the laws of this State, to direct the assignment of the entire property of their corporation. I am aware that it has been held in some states that a board of directors has a right to direct a general assignment for the benefit of creditors. 1 Mor. Priv. Corp., § 513, says: "Upon the same principle, it has been held that the directors of a corporation have no implied authority to wind up the company, or to sell any property which is necessary in order to carry on its business. Directors are merely agents, and they are appointed for the purpose of managing the business in which the shareholders have agreed to unite. The value of this business as a commercial speculation, and the advisability of continuing it, are matters which concern those who have embarked in it, and not their managing agents. But it is the duty of a corporation to pay its debts; and they are justified in using the corporate assets for this purpose, although the company be thereby disabled from carrying on its business, provided they act in good faith, with due regard to the interests of all shareholders. It has been held that the directors of an insolvent corporation may convey the whole of its assets to a trustee for the payment of creditors,"—citing numerous authorities. Thompson, in his Commentaries on the Law of Cor-

porations (volume 3, § 3986), says: "There is much authority for the view that the directors of an insolvent corporation may, without the consent of the stockholders, make an assignment in good faith of all its assets to a trustee for the payment of its creditors, though, as the exercise of this power generally has the effect of putting an end to the corporation, its existence is denied by some courts. And, clearly, the directors have no such power where the governing statute prescribes a different mode of winding up the affairs of the corporation and liquidating its debts. The statutory mode is exclusive. The reason is that the statute forms a part of the security to the public, and one of the conditions upon which corporations subject thereto take their chartered powers." In this State we have a statute (sections 56 and 57, chapter 53, Code 1891) which provides for the voluntary dissolution of a corporation by the action of the stockholders; and as these sections provide a different mode of winding up the affairs of the corporation from that of an assignment of its property, by direction of the directors, we hold that the directors in this case, even if their meeting had been properly called and held, had no authority to direct the assignment of the entire property of said corporation without the consent of the stockholders. My conclusion therefore is that the court erred in dissolving the injunction awarded in this cause. The decree complained of is therefore reversed, with costs, and the cause remanded.

Reversed.

that he would not complete one, and was attempting to sell the contract for erecting two dwelling houses, all of which possession and control was to the exclusion of the stockholders, and, if not restrained, he would dispose of and sell all of said corporation's property. It is perceived that the acts complained of amount to an entire winding up of the affairs of said corporation, without consultation with or consent of the stockholders, which would surely be regarded as irreparable injury if the stockholders desired to continue business; and we do not consider this ground of demurrer well taken.

The injunction in this case was awarded upon the further ground that the assignment was directed at an illegal meeting by the directors, when one of their number was absent, and had no notice of the meeting; and, although it appears that their action was ratified by a subsequent directors meeting, the question is whether, if the first meeting of directors had been legal and proper in all respects, said directors had the power, under the laws of this State, to direct the assignment of the entire property of their corporation. I am aware that it has been held in some states that a board of directors has a right to direct a general assignment for the benefit of creditors. 1 Mor. Priv. Corp., § 513, says: "Upon the same principle, it has been held that the directors of a corporation have no implied authority to wind up the company, or to sell any property which is necessary in order to carry on its business. Directors are merely agents, and they are appointed for the purpose of managing the business in which the shareholders have agreed to unite. The value of this business as a commercial speculation, and the advisability of continuing it, are matters which concern those who have embarked in it, and not their managing agents. But it is the duty of a corporation to pay its debts; and they are justified in using the corporate assets for this purpose, although the company be thereby disabled from carrying on its business, provided they act in good faith, with due regard to the interests of all shareholders. It has been held that the directors of an insolvent corporation may convey the whole of its assets to a trustee for the payment of creditors,"—citing numerous authorities. Thompson, in his Commentaries on the Law of Cor-

porations (volume 3, § 3986), says: "There is much authority for the view that the directors of an insolvent corporation may, without the consent of the stockholders, make an assignment in good faith of all its assets to a trustee for the payment of its creditors, though, as the exercise of this power generally has the effect of putting an end to the corporation, its existence is denied by some courts. And, clearly, the directors have no such power where the governing statute prescribes a different mode of winding up the affairs of the corporation and liquidating its debts. The statutory mode is exclusive. The reason is that the statute forms a part of the security to the public, and one of the conditions upon which corporations subject thereto take their chartered powers." In this State we have a statute (sections 56 and 57, chapter 53, Code 1891) which provides for the voluntary dissolution of a corporation by the action of the stockholders; and as these sections provide a different mode of winding up the affairs of the corporation from that of an assignment of its property, by direction of the directors, we hold that the directors in this case, even if their meeting had been properly called and held, had no authority to direct the assignment of the entire property of said corporation without the consent of the stockholders. My conclusion therefore is that the court erred in dissolving the injunction awarded in this cause. The decree complained of is therefore reversed, with costs, and the cause remanded.

Reversed.

CHARLESTON.

O'CONNOR v. O'CONNOR *et al.*(BRANNON, PRESIDENT, *dissenting.*)

Submitted June 8, 1898—Decided November 26, 1898.

45	354
47	328
45	354
48	476

45	354
51	154
52	534

45	354
e53	315
e53	317

45	354
64	138

1 FRAUDULENT CONVEYANCE—*Deed—Possession of Deed—False Pretense—Fraud.*

P. executed an absolute deed for his land to J. P., in consideration of one thousand nine hundred dollars cash, dated June 1, 1893; and J. P., not being ready at the time said deed was executed to pay the cash, obtained possession of the deed on pretense that he wished to take it to a neighboring town to show it to a man, and at the same time executed a writing, and delivered it to P., reciting the purchase of the land for one thousand nine hundred dollars, and the execution of the deed, and agreeing that, if the sum of one thousand nine hundred dollars was not paid to P. in three days, then the deed should be null and void, but, if the said money was paid as aforesaid, the deed was to be of full effect. J. P. obtained possession of said writing, and, without authority of P., changed it so to read "June 15th," instead of "June 3d," and, on the same day on which said deed was executed, conveyed said land to O. C. W., both of which deeds were placed on record, but no part of the purchase money was ever paid. Said deed was fraudulent and void as to P. (p. 368).

2. PENDENTE LITE PURCHASER—*Fraudulent Conveyance—Equities.*

On the 15th day of August, 1893, a suit in equity was instituted to set aside said deed as fraudulent and void by P., making J. P. and O. C. W. parties defendant. After process in said suit had been served, but before the bill had been filed, O. C. W. executed a deed for said land to the R. C. C. & C. Co. Said company thereby became a *pendente lite* purchaser, and took said

land subject to the equities in litigation in said bill, and was bound to abide by its result. (pp. 360-364).

3. POWER OF ATTORNEY—*Construction.*

On the 23d day of June, 1893, P. entered into an executory contract with L. H. K., by which he agreed to sell him said tract of land upon the terms and for the consideration therein set forth, and on the same day executed to L. H. K. a power of attorney, wherein he recited the facts in regard to his sale to J. P., his fraudulent conduct and failure to pay the purchase money, and also as to the sale to L. H. K. and authorized L. H. K. to institute and prosecute to final hearing a proper suit in equity in his name, or in the name of L. H. K., as it might appear proper, for the purpose of setting aside and annulling said deed of conveyance to J. P., the deed to O. C. W., and any other contracts that might have been made in reference to said tract of land; authorizing said L. H. K., to settle any and all matters of difference between him (P.) and J. P. (it appearing that there were several matters of account existing between P. and J. P.) and to attend to all business affairs of his generally. Subsequently J. P. paid to L. H. K. one thousand dollars of the original purchase money for said land, which P. declined to receive, and shortly afterwards brought suit to set aside his deed to J. P. as fraudulent and void. *Held*, that in the circumstances of the case, and in view of the facts set forth on the face of said power of attorney, it was not the intention of P. to authorize L. H. K. to receive and collect said purchase money from J. P., and its reception by L. H. K. did not ratify and confirm the sale to J. P., or waive the effect of the fraud. (p. 367).

ON REHEARING.

ADMINISTRATORS—*Appeal—Fraudulent Conveyance—Pendente Lite Purchaser.*

An administrator with the will annexed of a decedent who is indebted at the time of his death, and who leaves nothing with which to satisfy the same except a tract of land which has been obtained from him by fraud, to set aside which fraudulent conveyance from him a suit had been instituted by such decedent, and determined adversely to him in the circuit court, has the right to prosecute an appeal from said decree, holding that a purchaser from said fraudulent grantee, indirectly, during the pendency of such litigation, was an innocent purchaser, and entitled to hold the property. (p. 372).

Appeal from Circuit Court, Randolph County.

Suit by Patrick O'Connor against J. P. O'Connor, the Roaring Creek Coal & Coke Company and others, to set aside conveyances of land as fraudulent. From a decree in

favor of the coal and coke company, John L. Hechmer, plaintiff's administrator c. t. a., appeals.

Reversed.

SAMUEL V. WOODS and J. A. BENT, for appellant.

E. D. TALBOTT, BROWN JACKSON & KNIGHT, C. F. TETER, and FRED O. BLUE, for appellees.

ENGLISH, JUDGE:

This was a suit in equity brought in the circuit court of Randolph County by Patrick O'Connor against J. P. O'Connor and O. C. Womelsdorff, which litigation grew out of the following state of facts: On the 11th day of May, 1893, Patrick O'Connor, who was then about ninety years of age, entered into an executorial contract with his nephew J. P. O'Connor for the sale of two hundred and five acres of land, which was the whole estate of said Patrick O'Connor, situated in Randolph County, in the Roaring Creek coal field, at the price of one thousand eight hundred dollars, one-half of which was to be paid when the land was run out and the records examined, and the residue in two installments, payable in three months and six months from the date of the deed; stating that five dollars was paid, and the residue of said half was to be paid when said Patrick fulfilled his part of the contract. This paper does not appear to have been acted upon by either party. On the 1st of June, 1893, the plaintiff executed to J. P. O'Connor a deed for this land, absolute upon its face, in consideration of one thousand nine hundred dollars recited in the deed as in hand paid, but not in fact paid at all, which deed was acknowledged before the notary who wrote it on that day. On the same day, and at the same time, said J. P. O'Connor delivered to the plaintiff a written memorandum signed by him, reciting the execution of the deed, stating that it recited the payment of the purchase money, and agreeing that, unless said John P. O'Connor brought and delivered to the plaintiff the said one thousand nine hundred dollars by the 3d day of June following, then the deed was to be null and void. While this memorandum dated June 1, 1893, was in possession of the plaintiff, and after the time in which John P. O'Connor was

to pay the one thousand nine hundred dollars in order to have title to said land, he obtained possession of said paper from the plaintiff, representing that he wished to examine the same, and wrote over the figure "3" the figure "15," thereby extending the time in which he might make the said payment. This change is admitted, but the defendant denies that it was made without authority. On the same day John P. O'Connor executed a deed for this land, conveying the same to O. C. Womelsdorff, at the stated price of twenty-five dollars an acre (the real price being fifteen dollars), of which three thousand five hundred and eighty-seven dollars and fifty cents was recited as paid in hand, and the receipt thereof acknowledged, seven hundred and sixty-eight dollars and seventy-five cents was to be paid in three months, and the like sum on the 1st of December, 1893, and a vendor's lien was retained to secure the deferred payments. But O. C. Womelsdorff, the grantee therein, was not present, and never saw the deed, nor agreed to the terms thereof, unless the allegations of the deed be true, until more than ten days thereafter, when the deed was recorded. This deed was acknowledged by O'Connor and his wife on June 2, 1893. These deeds were both recorded in Randolph County on the 10th day of June, 1893, on motion of John P. O'Connor, who states that the consideration of this deed was fixed at twenty-five dollars an acre, instead of fifteen dollars, because said Womelsdorff requested it to be done. On June 23d Patrick O'Connor made to L. H. Keenan an executory contract under seal, and acknowledged it, agreeing to sell him this land at ten dollars an acre; one thousand dollars to be paid when the deed was delivered, and the residue in one year. This paper was recorded on the 24th day of June. On the same day Patrick O'Connor executed to said Keenan a power of attorney, reciting the execution of the deed to John P. O'Connor on the 1st day of June, 1893, conveying the two hundred and five acres of land at the price of one thousand nine hundred dollars cash, the receipt of which was thereby acknowledged as paid; and reciting that he had taken from John P. O'Connor a writing, signed by him, showing that if the said purchase money was not paid by June 3, 1893, the deed was to be null and

void, and that the said purchase money had never been paid, and that, contrary to agreement, the said deed had been placed on record in the clerk's office of Randolph County; and reciting that he was informed that John P. O'Connor had sold said land to O. C. Womelsdorff; and stating further that by memorandum in writing dated June 23, 1893, the plaintiff had sold said land to L. H. Keenan, and that he was entitled to have the same conveyed to him free from the claims of John P. O'Connor and said Womelsdorff; and authorizing said Keenan to institute any proper suit for the purpose of setting aside and annulling the deeds to John P. O'Connor and to said Womelsdorff, and any other contracts that might have been made in relation to said land, except the one to Keenan; and stating that Keenan was authorized to settle any and all matters of difference between the plaintiff and said John P. O'Connor and to attend to all his business affairs generally,—which paper was recorded on 26th day of June, 1893. About the 11th day of July, 1893, said John P. O'Connor paid Keenan one thousand dollars of the said one thousand nine hundred dollars, which he still has; the plaintiff refusing to receive it, or to ratify the action of Keenan in respect thereto. The bill in this case charges a combination and conspiracy between the defendants to cheat and defraud the plaintiff out of the title and ownership of his land, and prays that their deeds may be set aside as fraudulent and void, and for general relief. On the 1st day of September, 1893, after the writ had been served upon the said defendants, but before the bill was filed, O. C. Womelsdorff conveyed this land. by deed of that date, to the Roaring Creek Coal & Coke Company, a corporation, which assumed the unpaid purchase money, which deed was recorded September 9, 1893. At the January rules 1894, they filed an amended bill against the same defendants, together with said coal and coke company, to set aside its said deed as void, and for general relief. On the 14th of May, 1895, the cause was heard and a decree rendered holding the deed of John P. O'Connor fraudulent and void as to the plaintiff, but holding that the Roaring Creek Coal & Coke Company was an innocent purchaser without notice, and that the plaintiff, as against that company, was

not entitled to have his deed to John P. O'Connor, and John P. O'Connor's deed to Womelsdorff, and Womelsdorff's deed to said company, set aside, or the title restored to him but that the said company was entitled to have the title confirmed to it; and further holding that by reason of the fraud of John P. O'Connor, of which the court found him guilty, he was entitled to reap no benefit or pecuniary profit by reason of his sale to Womelsdorff, but that the plaintiff was entitled to the full benefit thereof, and that of the one thousand five hundred and thirty-seven dollars and fifty cents actually paid to John P. O'Connor by Womelsdorff, one thousand dollars of which went to Keenan, he should account to the plaintiff for five hundred and ninety-nine dollars and thirty-one cents, the amount thereof, and the plaintiff should have the privilege of a settlement with said Keenan for the one thousand dollars paid by John P. O'Conner to Keenan; and ordering Womelsdorff to pay the residue, one thousand five hundred and thirty-seven dollars and fifty cents, with interest from June 1, 1893, to the plaintiff,—holding that the actual price Womelsdorff paid for the land was fifteen dollars an acre. This decree further provided that, upon the payment of this money by Womelsdorff, his vendee should have the land discharged from the vendor's lien, but, if default was made, the land was directed to be sold in the manner therein prescribed; and from this decree the plaintiff applied for and obtained this appeal.

The first assignment of error relied upon by the appellant is claimed to be in the action of the circuit court holding that the deed executed by said Patrick O'Connor to John P. O'Connor on the 1st day of June, 1893, was fraudulent and void as to said Patrick O'Connor, but that the Roaring Creek Coal & Coke Company was an innocent purchaser of the said land, without notice of such fraud, because the said coke company was a *pendente lite* purchaser, and was not entitled to any notice of the pendency of this suit, under section 13 of chapter 139 of the Code, because this was not a suit or proceeding "to subject real estate to the payment of any debt or liability," within the meaning of that section, and because the contract and power of attorney between Patrick O'Connor and L. H. Keenan were

recorded, in which Patrick O'Connor expressly repudiated this sale and the sale to O. C. Womelsdorff, and directed the institution of proper suits to vacate the same.

In considering this assignment of error, let us first look to the question raised by the fact that the Roaring Creek Coal & Coke Company purchased this land from Womelsdorff on the 1st of September, 1893, after the suit was brought, but before the bill was filed. If Womelsdorff, under all the circumstances of this case, could have conveyed this land, yet said coal company was a *pendente lite* purchaser, and was bound to take the land with all the burdens sought to be imposed by the suit. Upon the question as to whether said coal company in this instance should be considered a *pendente lite* purchaser, attention is called to the case of *Harmon v. Byram's Adm'r*, 11 W. Va., 511, in which case the second point of the syllabus reads as follows: "H. sued out a summons in chancery against B. on the 3d day of January, 1872, which is served on the 6th of the same month. The bill is filed at February rules following. On the 20th of January, after summons served, and before bill filed, P. purchases the whole or a part of the land which is proceeded against in the suit. Held, that P. is a *pendente lite* purchaser." In point 4 of the syllabus in the same case it is held that "every person purchasing *pendente lite* is treated as a purchaser with notice, and is subject to all the equities of the person under whom he claims in privity; and it makes no difference whether the purchaser *pendente lite* be the claimant of a legal or equitable interest, or whether he be the assignee of the plaintiff or defendant." It was also held by this Court in the case of *Zane v. Fink*, 18 W. Va., 693 (Syl. point 1), that: "Ordinarily the decree of the court binds only the parties and privies in representation or estate, but he who purchases, during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party. This rule, however, is modified to a considerable extent in some cases by our statutes in relation to recording *lis pendens*; and there are perhaps some other exceptions to the rule, in

part, according to the principles governing courts of equity." The same principle is stated in the case of *Lynch v. Andrews*, 25 W. Va., 751.

Can there be any question in this case that the Roaring Creek Coal & Coke Company was a *pendente lite* purchaser of the tract of land in controversy? The purchase was made on September 1, 1893, the suit was instituted on the 15th day of August, 1893, and the process had been served before this purchase was made and before the bill was filed. The process having been served on the defendant Womelsdorff on the 18th day of August, and on John P. O'Connor on the 23d of August, and the bill filed at October rules, the *lis pendens* related to the service of the writ. From that time the suit was pending, and the said Roaring Creek Coal & Coke Company must be regarded as a *pendente lite* purchaser, unless the statute found in section 13 of chapter 139 of the Code requires that, under the circumstances of this case, notice of the pendency of said suit should have been recorded in order to affect said purchaser. That section provides that "the pendency of an action, suit, attachment, or proceedings to subject real estate to the payment of any debt or liability upon which a previous lien shall not have been acquired in some one or more of the methods prescribed by law shall not bind or affect a purchaser of such real estate for a valuable consideration without notice, unless and until a memorandum setting forth the title of the cause, the court in which it is pending, the general object of the suit, attachment, or other proceeding, the location and quantity of the land as near as may be, and the name of the person whose estate therein is intended to be affected by the action, suit, attachment, or proceeding, shall be filed with the clerk of the county court in which the land is situated," which is required to be recorded without delay in the deed book, and indexed in the name of both parties. We find the doctrine in regard to purchasers *pendente lite* stated by Story in his *Equity Jurisprudence* (volume 1, p. 411, § 405), where the author says: "It is upon similar grounds that every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. And therefore a purchase made of property act-

ually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit;" citing the case of *Tilton v. Cofield*, 93 U. S., 163, in which it is held that "a purchaser of property *pendente lite* is as conclusively bound by the results of the litigation as if he had from the outset been a party thereto." Story, in the same volume (page 412, § 400), says: "Ordinarily it is true that the decree of a court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit. Where there is a real and fair purchase without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy, for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end of litigation." In the case of *White v. Perry*, 14 W. Va., 66, JUDGE GREEN, in delivering the opinion of the Court, on page 76, says: "The doctrine of *lis pendens*, however necessary, is harsh in its effect upon *bona fide* purchasers, and has always been confined in its operation to the extent of the policy on which it was founded,—that is, to give full effect to the judgment or decree which might be rendered in the suit depending at the time of the purchase (the *lis pendens*,)—and it applied only to proceedings directly relating to the thing or property in question. * * * This suit pending at the time that the deed was made by Perry to the appellant in the case before us was an action of debt to recover a personal judgment against Perry. The object of this suit was not to subject Perry's lands to sale. The suit for that purpose was not instituted till after the deed had been made by Perry to Tolly, and duly recorded. The rule of *lis pendens* has, therefore, no application in this case." In the case of *Wilfong v. Johnson*, 41 W. Va., 283, (23 S. E. 730),—very similar in many points to the one under consideration,—HOLT, JUDGE, in delivering the opin-

ion of the Court, on page 287, 41 W. Va., and page 731, 23 S. E., says: "The evidence shows that these grantees from the defendant Johnson learned through an agent who examined the records for them that Samuel O. Johnson had a general warranty deed for the land in controversy from the defendants to the petition, Mrs. Wilfong and husband, for consideration of fifty dollars in hand paid. He found no liens or judgments against the land, and considered Samson O. Johnson's title to the land as good as any man's title could be to land. But if he had looked further, and in the other clerk's office, he would have found a suit pending for setting aside the deed of which he speaks as obtained by misrepresentation and fraud; and whether he looked for it or not, or, having searched the records, failed to find it, this pending suit had the effect of notice to his principal. This doctrine is founded on the policy that real property which is specifically sued for shall abide the result of the suit; for otherwise, by successive alienations, the litigation might be indefinitely prolonged [citing *Arnold v. Casner*, 22 W. Va., 444; *Zane v. Fink*, 18 W. Va., 693; *Harmon v. Byram's Admr's*, 11 W. Va., 511]. It does not come within the letter or meaning of section 13 of chapter 139 of the Code, requiring a memorandum of *lis pendens*, in certain cases, to be recorded."

In determining whether it was necessary in the case at bar to record a *lis pendens* in order to affect the Roaring Creek Coal & Coke Company with notice of the suit, it is necessary we should refer to the record; and in so doing we find that the object of this suit, as it was in the case of *Wilfong v. Johnson*, was to set aside as fraudulent and void the deed made by the plaintiff to J. P. O'Connor, and by J. P. O'Connor to Womelsdorff, and that it was not a proceeding to subject real estate to the payment of a debt or liability, and therefore it was not necessary to record a *lis pendens* to give notice to the Roaring Creek Coal & Coke Company of the suit which was pending at the time of its purchase. Counsel for the appellees contend that, under the circumstances of this case, it was necessary to record a *lis pendense* to give said coal company notice and prevent it from being an innocent purchaser, and rely upon the case of *De Camp v. Carnahan*, 26 W.

Va., 839. A reference to that case, however, shows that it was an attachment suit in equity to subject land to the payment of a debt. The third point of the syllabus of that case reads as follows: "Where an attachment suit in equity was instituted to subject land to the payment of a debt, and the land was sold under a decree in said cause, and a deed was made for the property to the purchaser at said sale, but after the levy of the attachment the debtor conveyed, for a valuable consideration, the land to another, and no *lis pendens* was recorded as is required by section 14 of chapter 139 of the Code, the purchaser from the debtor will hold the land as against the purchaser under the decree."

In the light of the rulings above quoted, my conclusion is that the circuit court erred in holding that the Roaring Creek Coal & Coke Company was an innocent purchaser of the two hundred and five acres of land in controversy, and that for that reason the plaintiff was not entitled to have the deed from J. P. O'Connor to O. C. Womelsdorff and from O. C. Wolemsdorff to said company set aside as to said company. The finding of said decree that the deed executed by Patrick O'Connor to J. P. O'Connor on the first day of June, 1893, was fraudulent and void as to Patrick O'Connor is not complained of as error by the appellant.

The remaining question for discussion in this case is as to the proper construction and effect of the power of attorney executed by the plaintiff, Patrick O'Connor, to L. H. Keenan. It seems that the plaintiff on the 23d of June, 1893, made an executory contract whereby he agreed to sell him this same two hundred and five acres of land at ten dollars per acre,—one thousand dollars to be paid when the deed was delivered, and the residue in one year,—which paper was recorded on the 24th day of June, 1893, and on the same day said Patrick O'Connor executed to said Keenan a power of attorney which reads as follows: "Whereas, on the 1st day of June, 1893, I executed a deed of conveyance to John P. O'Connor for a certain tract of land, containing two hundred and five acres, situated in Randolph Co., W. Va., on the waters of Roaring creek, at the price of \$1,900 cash, and acknowledged the receipt of the payment of said money to me in said deed, and took

from the said O'Connor a paper writing, signed by him, showing that if the purchase money aforesaid should not be paid to me by the 3rd day of June, 1893, then the deed was to be null and void; and whereas, the said O'Connor has never paid me the said purchase money, and has contrary to the said agreement in writing with me, placed the said deed of conveyance on record in the clerk's office of the county court of said county, and, as I am informed, has sold said land to one O. C. Womelsdorff; and whereas, by contract in writing bearing date of June 23rd, 1893, I have sold said tract of land to L. H. Keenan, who is entitled to have the same conveyed to him free from the claims of the said O'Connor and Womelsdorff, or either of them: Now, therefore, I hereby authorize the said Keenan to institute and prosecute to a final hearing a proper suit in equity in my name and his name, or in the name of either, as it may appear proper to do for the purpose of setting aside and annulling the said deed of conveyance to the said O'Connor and the deed of conveyance to the said Womelsdorff, and any other contract or deeds of conveyance that may be made or have been made in relation to the said tract of land, other than the one made by me to the said Keenan, and that said Keenan is authorized to settle all matters of difference between me and the said O'Connor, and attend to all business affairs of mine generally. Witness my hand and seal June 24th, 1893. [Signed] Patrick O'Connor. [Seal.]" Which power of attorney was duly acknowledged and recorded. It appears from the testimony of L. H. Keenan that he entirely ignored the executory contract between himself and Patrick O'Connor, because he states that some time subsequent to the date thereof he tried to sell said land to O. C. Womelsdorff, simply as the agent of Patrick O'Connor. It appears from the testimony of L. H. Keenan: That on the 11th day of July, 1893, he met J. P. O'Connor, the defendant, and told him that the one thousand nine hundred dollars cash that was to be paid by him to Patrick O'Connor had not been paid, and he wanted to collect the same. After discussing the transaction, J. P. O'Connor said that he would pay one thousand dollars, which sum he did pay that day, and was to execute his note for the remaining nine hundred, to

bear date July 11, 1893, with interest, with good security, to be approved by Patrick O'Connor. He was to have a few days, or a reasonable time, in which to make such note and give security. He was to give as security on the note Candolph Phillips and others. He received the one thousand dollars and deposited it in the bank in the name of "L. H. Keenan, attorney for Patrick O'Conner." He told Patrick O'Connor what he had done, and O'Connor said that was not in accordance with the deed and agreement, and he would not accept it. That he met John P. O'Connor in Elkins some time subsequent, and told him what Patrick O'Connor had said. He replied that he would not pay the remaining nine hundred dollars, or execute the said note, until certain equitable defects in the title to the property had been cured, for which he had brought a suit, or was about to bring a suit, to quiet the said title. That he said to him that he had better pay the amount, and he replied, "No; I have the old man fast, and I propose to hold him." Patrick O'Connor, in his deposition, when asked to state whether or not he ever authorized any one, particularly L. H. Keenan, attorney at law, to collect of the defendant J. P. O'Connor the sum of one thousand dollars as part payment by said O'Connor to him for the said two hundred and five acres of land sold to said J. P. O'Connor, denied that he had given any such authority.

This brings us to the question whether said power of attorney, executed in the circumstances surrounding its execution, authorized said Keenan to collect and purchase money. In the case of *Dyer v. Duffy*, 39 W. Va., 149, (19 S. E. 540), (Syl. point 5), this Court held that "one dealing with an agent acting under written power is taken to deal with the power spread out before him, and must inspect it, to see whether the agent's act is authorized by the power." Point 6 of the same case holds that: "One dealing with a special agent does so at his peril. He must be careful to see that the agent's authority covers the act he does." The appellee, in his brief, relies upon the case of *Hutton v. Dewing*, 42 W. Va., 691, (26 S. E. 197), where it was held: "If one, with knowledge of a fraud which would relieve him from a contract, goes on to execute it, he thereby confirms it, and cannot get relief against it.

He has but one election to confirm or repudiate the contract, and, if he elects to confirm it, he is finally bound by it." Now, when we take this power of attorney by the four corners and read it, we perceive that Patrick O'Connor, instead of recognizing and approving said conveyance to John P. O'Connor, clearly repudiates it, and authorizes said Keenan to institute and prosecute to final hearing a proper suit, either in said Keenan's name or his own, for the purpose of setting aside and annulling said deed of conveyance, and on the 15th day of August, 1893, this suit was instituted for that purpose in the name of said Patrick O'Connor. Now, if it had been the intention of said Patrick O'Connor that said Keenan should collect this purchase money from J. P. O'Connor, and to ratify and confirm said sale to him, he certainly would not have authorized said suit to set aside and annul said deed of conveyance, nor would he have objected to receiving the one thousand dollars which was paid to Keenan. And, further, it appears from the testimony that there were various matters of account existing between said Patrick and J. P. O'Connor, which must have been intended in said power of attorney, where it speaks of settling all matters of difference between them. The said Patrick having denounced the transaction with J. P. as tainted with fraud, and directed a suit to set it aside, he surely did not intend in the same instrument to go on and ratify and affirm it; and then the testimony shows that Patrick O'Connor, as soon as he was informed of the fact that J. P. O'Connor had paid the one thousand dollars to Keenan, refused to receive it, and repudiated the transaction. Although Keenan may have held an executory contract from Patrick O'Connor for this tract of land, this purchase money one thousand nine hundred dollars, even if the deed had been properly delivered to J. P., and the transaction had been free from fraud, was not coming to Keenan, and he could not receive it, unless specially authorized so to do; and, in my opinion, he was not so authorized by said power of attorney. See *Curry v. Hale*, 15 W. Va., 867, where it is held that: "Where a person deals with an agent, it is his duty to ascertain the extent of the agency. He deals with him at his own risk. The law presumes

him to know the limit of the agent's power, and, if the agent exceeds his authority, the contract will not bind the principal, but will bind the agent." Keenan says in his testimony that, subsequent to the date of his executory contract with Patrick O'Connor, he tried to sell this land to O. C. Womelsdorff, simply as the agent of Patrick O'Connor, thus showing that he utterly ignored the executory contract between himself and Patrick O'Connor. It appears in this case that J. P. O'Connor had obtained this deed from his old uncle, nearly ninety years of age, by representing that he wished to show it to some man in Beverly; that he was to return it in three days, if the purchase money was not paid. But, without waiting one day, he conveyed the land to Womelsdorff, for a consideration nearly double what he was to pay for it. More than a month after he received the deed and conveyed the land to Womelsdorff, becoming aware of the existence of this power of attorney, he paid one thousand dollars to said Keenan, with a view, no doubt, of thereby securing a ratification of the deed he had obtained by fraud. But Patrick O'Connor refused to accept it, and thereby repudiated the act of said Keenan in receiving the same as soon as he was informed of the fact, and in a short time thereafter instituted a suit to set aside said deed on account of the fraudulent manner in which it was obtained. This prompt action on the part of Patrick O'Connor clearly indicates that it was never his intention to ratify said deed, or authorize the collection of said purchase money. That the sum of one thousand dollars was paid to Keenan by J. P. O'Connor with the intention of thereby ratifying the sale by Patrick O'Connor to himself is manifest from the fact that when informed that Patrick would not accept the one thousand dollars, and being told by Keenan he had better pay the other nine hundred dollars, he replied, "No; I have the old man fast, and I propose to hold him."

My conclusion is that the circuit court erred in holding, in the circumstances of this case, that the Roaring Creek Coal & Coke Company was an innocent purchaser of the land in controversy; and said circuit court having (as I think, properly) found that the deed dated the 1st day of June, 1893, from Patrick O'Connor to the defendant J. P.

O'Connor was fraudulent and void as to the plaintiff, said J. P. O'Connor derived no title thereby, and, as a matter of course, could confer none upon O. C. Womelsdorff; and the said J. P. O'Connor, having derived no title to said land, owed no purchase money to Patrick O'Connor; and, as said Patrick O'Connor refused to accept any purchase money from him, he in no manner ratified or validated said deed; and the circuit court erred in holding that said Patrick O'Connor was entitled to any portion of the one thousand dollars paid to said L. H. Keenan, or to any portion of the purchase money remaining unpaid. For these reasons the decree complained of is reversed, with costs, except so far as it holds that the deed dated June 1, 1893, from Patrick O'Connor to J. P. O'Connor, was fraudulent and void as to plaintiff.

ON REHEARING.

On the 12th of February, 1898, a rehearing was allowed on the motion of the Roaring Creek Coal & Coke Company. On June 8th, 1898, the case was reheard and submitted.

The first point relied on by the petitioner to entitle it to a rehearing of the cause was that the decision had been based on an appeal obtained by the administrator with the will annexed of Patrick O'Connor, deceased, who, it was claimed, had no standing in court to raise the question considered and decided. It was alleged in the bill, and undenied in the answer, that the plaintiff, Patrick O'Connor, was at the time of filing said bill over ninety years of age, and had no home or means of support, his only property being the two hundred and five acre tract mentioned in the bill. At the time the decree was rendered in the circuit court, which was appealed from, said Patrick O'Connor was still in life. After his death the appellant was duly appointed, and gave bond, as his administrator with the will annexed. When John L. Hechmer took upon himself the duties of administrator, he represented an estate with a considerable indebtedness existing against it, and the only source to which he could look for its satisfaction was the proceeds of said land which had been contracted

to be sold by his testator; and, while the circuit court held that the title had been obtained from said testator by fraud, it further held that the land was then in the hands of the Roaring Creek Company, an innocent purchaser, and the estate of Patrick O'Connor was only entitled to the proceeds arising from the transfer of the fraudulent title acquired from J. P. O'Connor through O. C. Womelsdorff. Although J. P. O'Connor committed a fraud on his uncle, it is nevertheless true that Patrick O'Connor contracted to sell him the land, and when that contract was vitiated by fraud he contracted to sell it to L. H. Keenan. What effect did this contract have upon the estate? The authorities say that, when land is articted to be sold, it becomes personalty. On this question Story's Equity Jurisprudence (section 1212) says: "Another class of cases illustrating the doctrine of implied trusts is that which embraces what is commonly called the 'equitable conversion of property.' By this is meant an implied or equitable change of property from real to personal, or from personal to real, so that each is considered transferable, transmissible, and descendible according to its new character, as it arrises out of the contracts or other acts and intentions of the parties. This change is a mere consequence of the common doctrine of courts of equity, that, where things are agreed to be done, they are to be treated for many purposes as if they were actually done. Thus, as we have already had occasion to consider, where a contract is made for the sale of land, the vendor is, in equity, immediately deemed a trustee for the vendee of the real estate, and the vendee is deemed a trustee for the vendor of the purchase money. Under such circumstances, the vendee is treated as the owner of the land, and it is devisable and decendable as his real estate. On the other hand, the money is treated as personal estate of the vendor, and is subject to like modes of disposition by him as other personalty, and is distributable in the same manner on his death. So, land articted to be sold and turned into money is reputed money, and money articted or bequeathed to be invested is ordinarily deemed to be land." Yet the Roaring Creek Coal & Coke Company, which claims to have been an innocent purchaser indirectly from Patrick O'Connor, in its petition for a

rehearing, insists that the proceeds of this tract of land are still realty, and for that reason the administrator had no right to apply for or obtain this appeal. When the administrator assumed his trust, he took the estate as he then found it. Debts existing against it, as appears from the testimony and the will, if we may look to it for that purpose, and the proceeds of this land were all he had to look to for their liquidation. Where the personal estate of a decedent is insufficient for the payment of his debts, Code, c. 86, s. 7, allows the administrator to prosecute a suit in equity to subject the real estate to the payment thereof. When this administrator looked to the records, he found a decree of the circuit court of Randolph County, holding that the deed executed by Patrick O'Connor to the defendant, dated June 1, 1893, was fraudulent and void as to his testator, Patrick O'Connor, but that the Roaring Creek Coal & Coke Company was an innocent purchaser for value without notice, and the plaintiff was not entitled to have the deeds from himself to J. P. O'Connor, and from J. P. O'Connor to O. C. Womelsdorff and from Womelsdorff to said coal and coke company, set aside, and the title and possession of said land restored to him, but that said company was entitled to have its title and possession through said deeds confirmed to it. I have endeavored, in the opinion above quoted, to show that said coal and coke company was a *pendente lite* purchaser, and for that reason bound by the result of the pending litigation, and for the same reason could not be properly held an innocent purchaser without notice; and I refer to and adopt said former opinion, so far as it discusses said question, and the conclusion then reached, as well. Said administrator then found said land in the possession of said coal and coke company under a fraudulent conveyance confirmed by an erroneous decree. What was he to do? A review of the facts in the light of law convinced him at once that the legal title was not in said company. The decree before him held that the deed executed by Patrick O'Connor to the defendant J. P. O'Connor was fraudulent and void as to the plaintiff. As a consequence, the deed from J. P. O'Connor to Womelsdorff was void, as J. P. O'Connor could not convey the title he did not possess.

Counsel for said company in their petition for rehearing, and argument for the support of the same contend that the administrator with the will annexed has no standing to prosecute this appeal in his own name to set aside deeds to real estate, and reinvest the title in the heirs of the devisee of the defendant. Now, in the first place, no title has ever vested in said coal and coke company, for the reason that it was manifestly a *pendente lite* purchaser, and the title of its vendor has been held to be void as a result of the litigation pending at the time it became a purchaser. Now, if this appeal should be successfully prosecuted by the administrator, the result would only be to remove the cloud from the title to the land in controversy, by holding the title claimed by said company to be void as a *pendente lite* purchaser, the circuit court, as I have said, having held the title of John P. O'Connor fraudulent and void; and for that reason he could confer no valid title upon Womelsdorff, under whom the said company claims. That would leave the land articulated to be sold to L. H. Keenan under the agreement made between Patrick O'Connor and said Keenan dated June 23, 1893, which agreement was recorded on the next day, for a consideration of ten dollars per acre.

Attention is called in the brief of counsel for said company on a rehearing to an error committed in stating a fact, to wit, as to said Keenan endeavoring to sell said land to O. C. Womelsdorff after the date of the above mentioned agreement. This was an error committed by inadvertence, and the inference drawn from it was also erroneous; but it is immaterial, and does not affect the case. This land was articulated to be sold, and for that reason must be regarded as personalty, and the administrator surely has a right to clear away these false and fraudulent titles which incumber the estate which it is his duty to administer. His success in this case will not have the effect of restoring the property to the heirs at law, but will give it to the personal representative to be administered. I am therefore of opinion that the administrator has the right to prosecute this appeal.

Having expressed my views as to said company being a *pendente lite* purchaser in the opinion above quoted, I adopt said opinion, except so far as herein corrected, and on this

rehearing hold that said Roaring Creek Coal & Coke Company was a *pendente lite* purchaser, and bound by the result of the litigation then pending between said parties in said suit, and was not, therefore, an innocent purchaser. The decree complained of must therefore be reversed, and the cause remanded, with costs.

BRANNON, PRESIDENT, (*dissenting*):

I think the appeal ought to be dismissed because the administrator cannot maintain it. The heirs should have sued it out. When the deeds are annulled, they get back title, not the administrator. He is the administrator with will annexed, but the bill does not show that it vests any title to land in the administrator. The will is produced only with the petition for rehearing, and was not a part of the record, but it vests no estate in land in the administrator. The bill was filed, not to enforce purchase money, but, repudiating the sale and purchase money, it sought only to annul the deed and reclaim the land. The appeal seeks to reverse the decree because it did not give land by canceling the deed, and because it gave O'Connor money. The very feature of its giving purchase money is repudiated, and assigned as error. I, therefore, cannot see how the appeal can be sustained (as it is in the opinion prepared by JUDGE ENGLISH) on the idea of a trust arising from the sale in behalf of O'Connor for the purchase money, when that sale is alleged to be void for fraud, and the plaintiff does not go for purchase money, but repudiates it, and goes for land only. An administrator cannot prosecute an appeal from a judgment in a case involving title to land. *Vail v. Lindsay*, 67 Ind., 528.

I doubt, too, on another point. The power given by O'Connor to Keenan contemplated either a suit to cancel the deed, or a compromise with John O'Connor, as Keenan might choose, and not solely by a suit. If so, his arrangement with John was a confirmation of the deed, as it was an election to take the purchase money and condone the fraud. *Hutton v. Dwining*, 42 W. Va., 691, (26 S. E. 197). Again, if Patrick O'Connor made a sale of the land to Keenan, as the power says he did, why could not Keenan, as

owner of the land, take the purchase money under the deed to John and thus confirm that deed? Patrick had gotten, or would get, pay for the land from Keenan, under the sale to him; and Keenan would be entitled to sue for the land, or take the purchase money from John in lieu of it. I have not examined this feature of the case minutely, but it so comes to my mind.

Reversed.

CHARLESTON.

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STYLES v. LAUREL FORK OIL & COAL CO. *et al.*

Submitted June 15, 1898—Decided November 26, 1898.

1. CORPORATION—*Stockholders—Suit to Wind up.*

In a suit to wind up the affairs of a defunct corporation, the stockholders are necessary parties. (p. 378).

2. PROCESS—*Service of Process—Order of Publication—Record—Decree.*

Where it does not appear from the record whether process was duly served, or order of publication duly published and posted, or not, except from the decree, which declares that "process was duly served" or "order of publication was duly executed as to the defendants," it will be presumed that it was so served or executed. (p. 379).

3. PROCESS—*Service of Process—Order of Publication—Record—Decree.*

But when the record shows the process or order of publication, and shows clearly that process was not served or order of publication executed as to any particular defendant, such declaration in the decree will not raise such presumption as to such defendant. (p. 379).

4. ORDER OF PUBLICATION—*Construction—Corporation.*

An order of publication as follows: "West Virginia, to wit: At rules Held in the Clerk's Office of the Circuit Court of Wood County on the first Monday in January, 1897. Robert G. Styles, Administrator of the Estate of W. C. Styles, Jr., Deceased, Complainant, vs. Laurel Fork Oil and Coal Company, a Corporation, and Others, Defendants, In Chancery. The object of this suit is to recover from the defendant the Laurel Fork Oil & Coal Co., a corporation, \$25,646.10 interest and costs, to dissolve and wind up the affairs of said corporation, and distribute the proceeds of sale of property of said corporation, to attach and subject to sale the tract of——acres of land owned by said corporation, to have a receiver appointed for the assets of said corporation, and for general relief; and it appearing by affidavit filed that L. C. Gratz, H. S. Gratz, Ella Fell, Mrs. H. A. Styles, John Scott, and S. G. Rosengardner are not residents of this state, on motion of the complainant, by counsel, it is ordered that said absent defendants do appear within one month after the first publication of this order, and do what is necessary to protect their interests in this suit, and that a copy of this order be forthwith published and posted according to law. (A copy. Teste.) O. M. Clemens, Clerk,"—is not an order of publication against the defendant corporation, under the statute. (p. 373).

Appeal from Circuit Court, Wood County.

Bill by Robert G. Styles, administrator of W. C. Styles, against the Laurel Fork Oil & Coal Company and others. Decree for plaintiff, and defendants appeal.

Reversed.

MERRICK & SMITH, for appellants.

V. B. ARCHER, for appellee.

MCWHORTER, JUDGE:

Robert G. Styles, administrator of the estate of W. C. Styles, deceased, who was a stockholder and creditor of the corporation sued, at the January rules, 1897, filed his bill in equity, at the clerk's office of Wood County circuit court against the Laurel Fork Oil & Coal Company, a corporation, L. C. Gratz, H. S. Gratz, Ella G. Fell, Mrs. H. A. Styles, executrix of the last will and testament of H. A. Styles, deceased, James Scott, S. G. Rosengardner, and others, whose names were unknown, and who were stockholders in said corporation, for the purpose of winding up

the affairs of the defendant corporation, upon the ground that the charter of said corporation had expired, and for the recovery of a money demand against the same. A summons in chancery was issued against the said defendants, but not served on any of them, and was returned by the sheriff that "the within-named Laurel Fork Coal Company not found, and no president or other chief officer or other person found in Wood County, on whom service may be made." On the 6th day of January, 1897, plaintiff made and filed an affidavit setting up a claim for twenty-six thousand six hundred and forty-six dollars and ten cents, against the said defendant corporation, and stating that said defendant's charter expired May 8, 1889, and that it had not appointed any one its attorney in fact on whom process could be served, and there was no person in West Virginia on whom process could be served as to said corporation, and that the other defendants to said suit were nonresidents of West Virginia, and sued out an order of attachment, which he caused to be levied on seven hundred and seventy-four acres of land, the property of said corporation. Plaintiff also filed an affidavit, under the statute, to the fact that said defendant corporation was a corporation, and that no person could be found in Wood County upon whom process could be legally served in said cause, and further, that L. C. Gratz, H. S. Gratz, Ella G. Fell, Mrs. H. A. Styles, James Scott, and S. G. Rosengardner were nonresidents of this State, and sued out at January rules, 1897, an order of publication against the said non-resident defendants. On the 12th day of January, 1897, on motion of the plaintiff, the court appointed Samuel B. Styles special receiver of the property of said defendant corporation, consisting of lands in Wood and Ritchie counties, and also of two producing oil wells therein. On the 19th day of February, the defendants Lewis C. Gratz, Henry S. Gratz, Ella G. Fell, and James P. Scott—all the defendants except S. G. Rosengardner and Mrs. H. A. Styles, executrix, against whom the order of publication was made—appeared and filed their general demurrer to the bill, which, having been considered, was overruled by the court, and said defendants were required to answer within thirty days from that date; and on the 8th day of

May, 1897, said defendants by leave of the court, filed their answer, not waiving any exceptions to the bill on account of any errors therein. On the 28th of August, 1897, plaintiff filed in open court his answer and special replication to said answer; and, on the 4th day of the following month, the cause was heard as set out in the decree, "upon the order of publication duly executed as to the defendants, upon the bill and exhibits therewith filed, and cause regularly set for hearing at the rules, upon the answer and cross bill of Lewis C. Gratz, Henry S. Gratz, Ella G. Fell, and James P. Scott, filed May 8, 1897, and upon the special replication and answer of the plaintiff to said answer, upon depositions and arguments of counsel," when, on motion of plaintiff, the cause was referred to a commissioner of the court. with directions to take, state, and report to the court:

First, a settlement of the accounts between the plaintiff and the Laurel Fork Oil & Coal Company; second, what liens attached to the real estate owned by the corporation, and the nature, amount, and priority thereof; third, the debts, if any, by simple contract of said corporation; and fourth, the names of the stockholders of said corporation, with the amount of stock held by each, and any other matter deemed pertinent by himself or required by any party in interest,—under which decree, W. W. Jackson, commissioner, made and filed his report, to which the responding defendants filed four exceptions. And on the 5th day of January, 1898, the cause was heard, the exceptions to the commissioner's report were overruled, a decree entered in favor of plaintiffs against the defendant corporation for five thousand two hundred and thirty dollars and eighteen cents, with interest from date of decree, and providing for the sale of defendant's lands to pay the same, unless the same should be paid within thirty days from that date, and a commissioner appointed to make sale of said land, from which decree the defendants Lewis C. Gratz, Henry S. Gratz, Ella G. Fell, James P. Scott, and Mrs. H. A. Styles, executrix of the last will and testament of Henry A. Styles, deceased, appealed to this Court.

Was the demurrer properly overruled? The bill in this cause is filed by a stockholder and creditor for the purpose

of not only enforcing the collection of his claim, but for the further purpose, as alleged in the bill, and as prayed for, of winding up the affairs of the corporation by decree in the suit. The bill names the known stockholders, "and others, whose names are unknown, who are stockholders in the Laurel Fork Oil & Coal Co.," as defendants. In a suit to wind up the affairs of a corporation, the stockholders are proper and necessary parties to the suit, being interested, and entitled to the assets after the payment of the debts of the corporation, and the stockholders should be parties in order to a proper distribution of the assets; and the only ground of demurrer urged in this case being for want of such parties, the demurrer was properly overruled, because the stockholders were made parties by the bill naming them in the caption, and the summons was issued against them.

Was the case properly matured when the court heard the cause, and referred it to the commissioner for account? Was the defendant corporation then or since before the court, by any process known to the law? A sufficient affidavit was made upon which to award an order of publication against all the defendants named in the bill, except the parties designated as "unknown stockholders." The order of publication was taken, however, only against the defendants L. C. Gratz, H. S. Gratz, Ella Fell, Mrs. H. A. Styles, James Scott, and S. G. Rosengardner, as non-residents of the state, who, on motion of plaintiff by counsel, were ordered to appear within one month after the first publication of the order, and do what was necessary to protect their interests in the suit. No order of publication was awarded or published either against the defendant corporation or the "unknown parties." No process was served on the corporation, and it entered no appearance.

Appellee insists that "counsel cannot be heard to say that this cause was not matured for hearing as to all the defendants, as the decree made in the case on September 4, 1897, adjudicates this matter as follows: This cause came on this day to be heard upon the order of publication duly executed, as to the defendants;" and that "want of publication or service as to any party cannot now be ques-

tioned,"— and cites *Shafer v. O'Brien*, 31 W. Va., 601, 606, (8 S. E. 298), as "directly in point here." Let us see. In that case the Court says: "It does not appear whether the company was served or not, except from the decree, which declares that process was duly served." The record failing to show whether there was service or not, and the decree declaring that "process was duly served," it was presumed that the proper service was had; but in the case at bar the record shows the order of publication, and shows that it was duly published and posted as to the defendants against whom it was taken, but it shows also upon its face that the defendant corporation was not included among the defendants who were ordered to appear. In the absence from the record of the process, in view of the declaration in the decree that "process was duly served," or that "order of publication was duly executed," the presumption would be that it was so; but when the process or order of publication, with the evidence of its service or execution is shown in the record, and from which it clearly appears that the order was not taken or published as to the defendant corporation, the decree raises no such presumption. The statute (chapter 124 of the Code) provides how nonresident defendants or unknown parties or corporation defendants, when no person can be found in the county upon whom process can be legally served, shall be brought before the court by order of publication; and, in order to have such party proceeded against properly before the court, the statute must be, at least, substantially complied with. Neither the defendant corporation nor all the stockholders thereof were before the court; and as held in *McCoy's Ex'r v. McCoy*, 9 W. Va., 443, "no decree should be rendered affecting the interest of an absent defendant, unless it appear—if he be not otherwise brought before the court—that he has been regularly proceeded against by order of publication;" and it is there further held that "the objection for want of due publication against the absent defendant may be taken by other defendants who may be affected by the decree against him, and, if made in the appellate court, will prove fatal, though the absent defendant was not a party to the appeal. The cause not having been ready for hearing in the court below, in the ab-

sence of parties who had a right to be heard upon all questions affecting their interests [especially the corporation defendant, upon which no process was served, and for which no appearance was entered, and against which no order of publication was awarded or published or posted], it is no condition for the appellate court to adjudicate any of the principles of the cause."

The decree of January 5, 1898, is reversed, and the cause remanded to the circuit court of Wood County, that proper process may be taken to bring the parties before the court, and the cause heard and decided according to the rights of the parties.

Reversed.

CHARLESTON.

WADE v. SOUTH PENN OIL CO.

Submitted June 11, 1898—Decided November 26, 1898.

1. *LEASE—Surrender of Lease.*

If a lessee for life or years take a new lease of the reversioner for a longer or shorter term than before, it is a surrender of the first lease. (p. 381).

2. *LEASE—Option—Surrender of Lease.*

A lease yielding rent and an option to purchase the fee outright are not inconsistent, and the taking such lease during the term of the option will not abrogate or surrender it. (p. 383.)

3. *LEASE—Option—Election to Purchase.*

Where there is a lease for years with rent, and an option to purchase the fee, an election to purchase under the option, and tender of the purchase price under it, ends the lease and its rent. (p. 383).

4. TENANCY—*Tenant for Life—Purchase of Reversion.*

A purchase of the reversion in fee by a tenant for years ends the tenancy, and the tenant is not thereafter estopped from denying further continuing title or rent in the landlord. (p 383).

Appeal from Circuit Court, Wetzel County.

Bill by James Wade against the South Penn Oil Company. Decree for defendant, and plaintiff appeals.

Affirmed.

THOMAS P. JACOBS and J. W. NEWMAN, for appellant.

A. B. FLEMING and U. N. ARNETT, for appellee.

BRANNON, PRESIDENT:

Wade, on June 9, 1893, made a lease for five years to McCaslin of a tract of land for production of oil and gas, giving Wade one-eighth of the oil and six hundred dollars per year for each gas well as rent, which lease was assigned July 2, 1890, by McCaslin to South Penn Oil Company. On April 5, 1894, Wade made a deed, which, in its granting clause, granted to one Smith all the oil and gas in the tract, but the deed says that it was agreed that Smith had an option to buy at the end of five years the oil and gas in the tract, and on payment they were to be conveyed to him; and the deed further states that it was on the condition that Smith ~~should, within~~ thirty days after the completion of a well, either pay Wade one thousand two hundred and fifty-two dollars, or release and reconvey; and it further states that it was on condition to be void if a well should not be completed in five years, unless Smith should pay one thousand two hundred and fifty-two dollars before the expiration of that time; and it further provided that, if "the above lease become void," then the oil and gas right should draw one dollar per acre yearly until "this option is paid in full, then deed to be made by parties of first part, or surrendered." Smith assigned his rights under this instrument to the South Penn Oil Company, April 16, 1894. Afterwards, July 31, 1895, the South Penn Oil Company took from Wade a lease of the same land for production of oil and gas for the term of ten years, covenanting to pay Wade as rent one-eighth of the oil and five hundred and fifty dollars per year for each gas well. The company made no develop-

ment during the life of the McCaslin lease, but under the lease to itself it developed oil upon the tract in paying quantity, and tendered Wade one thousand two hundred and fifty-two dollars in full satisfaction of his rights to the oil and gas, claiming right to do so under the said option; but Wade refused to receive it, and the money was paid in bank to his credit, and the answer of the company still tenders it. Wade demanded an eighth of the oil, and, the company refusing it, Wade brought this suit to compel a discovery of the oil produced from the tract, and for an account thereof. The circuit court dismissed his bill, and he appeals.

There is no dispute of facts. The sole question in the case is as to the effect of said papers. There can be no question that the taking of the second lease was, by law, a surrender of the McCaslin lease by the company, as, if a lessee for life or years, or his assignee, take a new lease, of the reversioner, for a greater or shorter term than before, there is a surrender of the first lease. 2 Minor, Inst. 791; 2 Tayl. Landl. & Ten. § 512. But then comes the question, what is the effect of the second lease upon the option instrument? If it were a mere lease, it would be surrendered like the first lease; but it is not a lease. What is it? It is an option to buy all the oil and gas within five years of its date. Read by its four corners, it imports nothing else. If its strictly granting part stood alone, it would be an absolute grant, and, no doubt, the subsequent lease covenanting to pay a share of the oil would be binding on the lessee company, for there is the covenant to pay, and a lessee cannot deny his landlord's title or his agreement to pay rent; and, even when one who is the real owner enters into a lease leasing his own land from another, this rule prevents him from setting up title in himself. 3 Tayl. Landl. & Ten. § 80. To bring the case under this doctrine, counsel for Wade contends that by the first lease and said option deed the company, at the date of the second lease, owned all the oil, and, taking the second lease, it is the case of a man making himself by deed a tenant to another of his own land, and he cannot deny his landlord's title, or avoid the rent. This would be so were this option not a mere option, but an instrument of abso-

lute grant which has already invested the company with ownership of the oil. But it had not so operated; it was a mere right to elect to become such owner. If an absolute grant, why such profuse provisions of option to purchase? There is no legal inconsistency between the second lease and the option. The former gave the lessee the right to mine for oil for ten years, paying rent; the latter gave the separate distinct right to purchase outright, at a fixed price, within five years. The purchase would, of course, close the lease by merger, as the right to the rental would pass from the landlord upon his sale of the fee to the tenant, and the leasehold estate would sink and cease in the reversion the greater estate, upon their union in the same person, under well-known principles. Tied. Real Prop. § 63. And it is clear, when a tenant purchases the fee, his estoppel to deny the landlord's title ceases, because the tenancy ceases. *Campbell v. Fetterman's Heirs*, 20 W. Va., 398; 2 Tayl. Landl. & Ten. § 502. He may thereafter set up his own title in fee against rent. Wood, Landl. & Ten. 373. The option invested Smith, before the second lease, with only an election to purchase, and its acceptance after said lease made a purchase after it. *Swearingen v. Wulson*, 35 W. Va., 463, (14 S. E. 249). Surely, a tenant can make a purchase of the fee after he becomes a tenant. This is all I see in the case. Upon tender of the price fixed for a purchase, Wade was not entitled to a share of the oil, and had no right to demand an account of the oil produced, and his bill was properly dismissed. He is entitled only to the one thousand two hundred and forty-two dollars. Decree affirmed.

Affirmed.

CHARLESTON.

ADKINS *et al.* v. GLOBE FIRE INSURANCE CO.

Submitted June 18, 1898—Decided November 30, 1898.

1. BILL OF EXCEPTIONS—*Signing—Appellate Court.*

A bill of exceptions must be signed by the judge, else it cannot be considered in the appellate court. (p. 385).

2. BILL OF EXCEPTIONS—*Record—Attestation by Clerk.*

The record entered in the law order book of a circuit court must attest that a bill of exception was executed and made part of the record, else such bill cannot be considered, though inserted in the record by the clerk. (As to exceptions shown by order, where there is no bill of exceptions.) (p. 386).

3. FOREIGN CORPORATIONS—*Service of Process—Return—Amendment of Return.*

A return of service of a summons in an action against a foreign insurance or other corporation upon an attorney appointed by it to accept service of process must show that he is the attorney so appointed to accept service of process. A return showing a delivery of a summons to "Alf. Paul, attorney in fact and of record for said Globe Fire Insurance Company," is bad, in not designating for what purpose he is attorney. Judgment on it is void. The return may be amended. (pp. 386, 389).

4. SERVICE OF PROCESS—*Acceptance of Service.*

"Service accepted, Sep. 6, 1897 Alf. Paul," is a bad acceptance. (p. 388).

5. INSURANCE—*Proof of Loss—Condition Precedent.*

A policy of insurance provides that proof of loss shall be furnished in sixty days after loss, and the loss payable in sixty days after such proof furnished. The furnishing such proof is a precedent condition to action or recovery, if not waived, and the plaintiff carries the burden of showing that such proof was furnished; but he need not show it unless the defense has pleaded the failure to furnish such proof. (p. 388).

45	384
48	396

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49	10

45	384
55	242

55	245
56	428

45	384
58	409

45	384
64	506

45	384
66	305
66	349

Error to Circuit Court, Kanawha County.

Action by M. A. Adkins and Nora B. Shoemaker against the Globe Fire Insurance Company. Judgment for plaintiffs. Defendant brings error.

Reversed.

ADAM B. LITTLEPAGE, for plaintiff in error.

L. A. MARTIN and J. W. KENNEDY, for defendants in error.

BRANNON, PRESIDENT:

In an action of *assumpsit* in the circuit court of Kanawha County, brought upon a policy of fire insurance by Adkins and Shoemaker against the Globe Fire Insurance Company, of the City of New York, the defendant not appearing in defense, a jury tried the case, and found a verdict for the plaintiffs, on which the court entered judgment. Afterwards, during the term, the defendant appeared, and moved for a new trial, but the court refused, and the defendant comes to this Court for relief.

The error assigned is the refusal to set aside the verdict. The grounds on which the defendant based its motion were that the verdict was contrary to the law and evidence, and because of facts shown in a petition for a new trial and certain affidavits to support it. The plaintiffs deny the right of defendant to have this Court consider the affidavits or the evidence on the ground, as claimed by them, that three papers printed in the record as bills of exception are not part of the record, because two of them are not signed by the judge; and that, though one is signed there is no evidence in the record to show its execution. A bill of exception must be signed by the judge. Even if the record state that it was signed, and it is not, it is not good; for the bill is equally admissible as a part of the record on the question of signing, and it is found not signed. Without signature, how can we say that the bill was finally settled, or the truth stated therein, or the paper a genuine one? The order calls for a paper signed, and it is not, and cannot be the one called for by the order. The Code demands that it be signed. As early as *Gordon v. Brown's Ex'r*, 3 Hen. & M., 219, it was held that "a paper

intended as a bill of exceptions to an opinion of the district court (two judges being present) ought not to be considered as such, if not signed by both." In *Com. v. Hall*, 8 W. Va., 259, though the record said a bill was signed, but it was not, this Court held that "a bill of exceptions to the opinion of the court overruling a motion for a new trial, not being signed by the judge, does not become a part of the record, and the evidence therein cannot be examined by an appellate court." Upon a like statute with ours it has been so twice decided in Illinois. *Jones v. Sprague*, 3 Ill., 55; *Reeves v. Reeves*, 54 Ill., 332. So in various states. Throop, Trials, § 2807. This rule of practice is important to be observed. Let us see if there are three separate bills of exception, and two of them unsigned. We ought to give liberal construction, to give to the party his exception. It is clear that the evidence was inserted in the bill, and later other matters were introduced for new trial, and that the whole paper is but one bill, its matter put in at different times during the term, as shown by different dates of the term stated in it, and by the language in opening, "Be it remembered," and in succeeding sections, "And be it further remembered," and the fact that no section has any seal or signature, and that such signature and seal are in due form at the close. So we must consider the bill if the record attests its execution. This it must do. *Bank v. Showacre*, 26 W. Va., 49. I find an order stating that defendant moved for a new trial, and in support of his motion submitted certain affidavits and his sworn petition, and that the court refused a new trial, "to which ruling of the court the defendant objected, and prayed that said exception be signed, sealed, and saved to it, and made part of the record; which is done." This surely attests the execution of the bill of exception.

We now examine the grounds for a new trial. One is surprise. This is based on the claim that the company had no notice of the suit, did not know that such a suit existed until the day of trial, when, after the case was called for trial, a telegram was sent from Charleston to the agent at Wheeling, informing him of the suit, and likely this did not reach the agent until the verdict had been rendered, and perhaps the judgment. Process was served in Ohio

County upon Alf Paul, as attorney in fact and of record for the company, and he accepted service besides. Paul makes affidavit that he has no recollection of service upon him, or of acceptance by him, and he is sure no copy was ever given him. The return of an officer upon process cannot be so contradicted. *Stewart v. Stewart*, 27 W. Va., 168. If we recognize this return, it follows that the alleged surprise is no ground for a new trial, as a party must not neglect or forget, but must appear and defend. His negligence or his misfortune in allowing the suit to escape his memory cannot prejudice the other party, he having done all the law required of him. *Post v. Carr*, 42 W. Va., 72, (24 S. E. 583). But is the return good on its face? I think not. It says that the summons was served "by delivering a copy to Alf. Paul, attorney in fact and of record for said Globe Fire Insurance Company." Attorney in fact for what purpose? To make a deed, or sell property, or accept service of process? The return does not say. The rule is that, where there is substitutionary service, not personal, the elements to make the service good in law must appear. If service be not on a defendant personally, but on someone for him, the return must state on whom service is made, and that the person is his wife, or member of his family, and over sixteen years of age, etc. The facts making the substitute a proper person for service under the law must appear. If he is president, director, cashier, or mayor, it must be so stated. This return should have stated that Paul was attorney appointed by the company to accept service of process. The sheriff must necessarily hunt and find the proper person for service, and be able to state that he is such. This return says that Paul was attorney of record. This does not help. If attorney for any purpose his power might be of record. We cannot assume therefrom that he was attorney to accept service. In fact, an appointment of an attorney for a foreign insurance company like this is not required, like a domestic corporation, under Code, c. 54, s. 24, to be recorded, but is only "filed" in the auditor's office by chapter 34, s. 15. *Frazier v. Railway Co.*, 40 W. Va., 224, (21 S. E. 723), holds that a summons against a corporation "may be on any person appointed pursuant to

law to accept service," and I notice the return there so showed, and I think such is the practice. The Code, in chapter 50, s. 38, which is applied by chapter 49, s. 6, requires that the return of service in suits against corporations must show "on whom" the service was. This does not mean merely his name, but his character or relation to the company to show the court that he is one who bears the relation to the company which preceding sections have pointed out as authorizing service. It must mean this, because those sections just before this pointed out the relations authorizing service. Said section pronounces a return failing to comply with it "invalid," and judgment on service not complying with said section has been held void. *Railway Co. v. Ryan*, 31 W. Va., 364, (6 S. E. 924); *Taylor v. Railroad Co.*, 35 W. Va., 328, (13 S. E. 1009). An acceptance is on the process reading: "Services accepted, Sep. 6, 1897. Alf. Paul." Who is he? We do not know by judicial cognizance that he is this company's attorney to accept service and he does not say so. This being a judgment by default, the return is part of the record, and for its defect the judgment could, after the term, be reversed on motion. *Midkiff v. Lusher*, 27 W. Va., 439. Of course, this defect could avail on motion for a new trial made during the term. The motion for a new trial was also based "on errors apparent on the face of the record;" and there is such error in this case. The plaintiffs were present at the motion. The court, for this cause, ought to have given a new trial. (See note).

There is another reason given by counsel for a new trial. The policy was issued July 1, 1897. The house, occupied at the time as a liquor saloon, was burned on the night of July 3, 1897, at 11 o'clock, and suit was brought September 2, 1897. The policy provides that the insured shall make and furnish certain proof of loss within sixty days after the fire, and the loss shall not be payable till sixty days after such proof of loss shall be furnished. This Court held, in *Peninsular Land Transp. & Mfg. Co. v. Franklin Fire Ins. Co.*, 35 W. Va., 666, (14 S. E. 237), that the furnishing such proof was a condition precedent to recovery on the policy; and *Flanaghan v. Insurance Co.*, 42 W. Va., 426, (26 S. E. 513), holds that the burden of showing that

such proof of loss was furnished is on the plaintiff. It is highly improbable that such proof was furnished so as to warrant suit on September 2d, according to plaintiff's own evidence. It is not shown when proof of loss was furnished. Indeed, there is nothing but hearsay to show that any was ever furnished; and that evidence, if not hearsay, would be no adequate evidence. But, as section 64, chapter 125, Code, says that "if the defense be that the action cannot be maintained because of failure to perform or comply with, or violation of any clause, condition or warranty" of the policy, the defendant must plead the clause not performed, we cannot likely give defendant the benefit of this view. It might be said with some plausibility that, in the absence of such plea, the plaintiff need not have entered upon the matter in evidence; but, as he did, and failed to prove what is requisite, it is to go against him as if the defendant had pleaded it. We reverse the judgment, set aside the verdict, grant a new trial, and remand the cause for such trial.

ON REHEARING.

In deference to counsel, I have made, on application for rehearing, further examination as to the service of process in this case. Where a statute allows service in any other mode than by actual personal service, it is called substitutionary or constructive service, and the return must show "on its face all the circumstances which authorize this manner of service" (22 Am. & Eng. Enc. Law, 182); otherwise, judgment by default is null (4 Minor, Inst, [2d Ed.] 533; *Id.* [3d Ed.] 646). As to corporations, they not being persons, the statute designates officers for service; and the statute must be strictly followed, else judgment by default is null. 4 Minor, Inst., 648; 6 Thomp. Corp., § 7503. "The sheriff's return should show clearly upon what officer or agent service was made, and the character of the officer or agency; * * * and, if the return fails to show that the service was upon the identical agent provided by statute, or at the place provided, it is insufficient." 22 Am. & Eng. Enc. Law, 184. The return must set out all the facts, so the court may judge of the sufficiency of

the service. *Hodges v. Hodges*, 71 Am. Dec., 388. I find the authorities strict on this point, because legal notice lies at the bottom of every suit to make judgment good. In *Dickerson v. Railroad Co.*, 43 Kan., 702, (23 Pac. 936), a return that service was by "delivering a copy thereof to Mr. Fish, agent of the within railroad company," was held bad, "as it contained no description or hint of the character of the agency." The court quoted a former case, saying it did not show service on any person named as service agent appointed under statute to accept service, and saying: "For aught that appears, said March may have been an agent to purchase coal or transact any temporary business. * * *" A statute allowed service on "the nearest station or freight agent," and a return showing service on "the nearest agent" was held bad, as it must describe the agent, in the language of the act, as "the nearest station or freight agent." *Huley v. Railroad Co.*, 80 Mo., 112. Where the statute allowed service on a "regular ticket or freight agent," a return not showing that the agent was a "regular" one was held bad in *Tullman v. Railroad Co.*, 45 Fed., 156. In *Railway Co. v. Hunt*, 39 Mich., 469, the statute allowed service on a "general or special agent" of a corporation, and a return of service on "agent of within-named defendant" was held bad. Judge Cooley asked: "What sort of an agent? Was he an agent to buy wood, or employ switchmen, or keep cattle off the track, or what was his agency?" "Service must be on the identical agent provided by the statute," says *Great West Min. Co. v. Woodmas of Alston Min. Co.*, (Colo. Sup.) 13 Am. St. Rep., 204 (s. c. 20 Pac., 771). The return must state all facts to make it good, and where it departs from the statute everything is inferred against it which such departure warrants. *Bank v. Sumner*, 79 Mo., 531, 97 Am. Dec. 280, note; 22 Am. & Eng. Enc. Law, 183. Hence, in this case we can fairly infer that Paul may have been an attorney in fact for other purposes than to accept service. Counsel cite *Wagon Co. v. Peterson*, 27 W. Va., 314, where the service was on the "lawful attorney" of a foreign insurance company. The court held it *prima facie* good to prevent a judgment being regarded null and void, but did not say that, if objected to before the judgment became

final, or by motion to set it aside for want of legal service, it would be good. Here it is on motion to set aside the judgment before it became final. And observe in that case the service was on a "lawful attorney," which imported perhaps one appointed by law, like "state agent," in *Stone v. Insurance Co.*, 78 Mo., 655, while "agent" was not good in *Gales v. Tuslen*, 89 Mo., 19, (14 S. W. 827); but in this case it is "attorney in fact and of record,"—not saying "lawful," not importing one appointed under the statute. The words "of record" do not help, because no law required the appointment to be recorded. The service is simply and only on an attorney in fact, and it thus plainly falls under the law above that, unless the agency is defined, the service is bad.

Counsel urge that defendant appeared, not to take advantage of defective return, but to set aside judgment, and thus waived the defective return. If it had done so before trial and judgment, this would be so. *Mahany v. Kephart*, 15 W. Va., 609. But defendant had to get rid of the judgment before it could attack the process. It should have pointed out this defect, and thus given opportunity to the other side to amend it. But I do not consider this a waiver, as the plaintiff is bound to see that his process is right. After a judgment is final, such defect is availed of by motion to reverse, assigning it as error. But before the judgment is final, it strikes me that, on a motion to set aside the judgment, defendant is entitled to the benefit of the objection,—any defect in the record. I know that for defective service a judgment by default at common law is reversible by writ of error, and not by motion, and the writ and return are part of the record. *Capehart v. Cunningham*, 12 W. Va., 750; *Nadcnbush v. Lane*, 4 Rand. 413; *Midkiff v. Lusher*, 27 W. Va., 439.

Counsel still insist that there is no bill of exceptions, because the record does not note it. I have shown above that it does. But suppose it does not. The order itself is sufficient to present the grounds of new trial without bill of exceptions, as it states that defendant moved the court to set aside verdict and judgment because contrary to evidence and law, and that defendant was taken by surprise, as it did not know of the pendency of the suit, and in sup-

port of its motion filed its petition and specified affidavits; and then it says that, "after considering the affidavits aforesaid in support of said motion to set aside said verdict and judgment, and grant a new trial, the court overruled said motion and refused to set aside said verdict and judgment and grant a new trial, to which ruling the defendant objected and excepted, and prayed that said exception be signed, sealed, and saved to it; which is done." This shows the motion, and its grounds, the documents read, the action of the court, and objection and exception thereto, and the declaration of the court that such objection and exception be saved to it. What more is needed? A bill of exceptions would show no more. This is sufficient without a bill of exceptions. *Hughes v. Frum*, 41 W. Va., 445, (23 S. E. 604); *Perry v. Horn*, 22 W. Va., 381; *Mitchell v. Baratta*, 17 Grat., 445.

Another reason for granting a new trial, as I am clearly of opinion upon further consideration, is surprise. An attorney had been the general counsel for the company, and after the loss by fire for which this suit is brought acted for the company in the matter. When the case was called, this attorney stated to the court that he desired to make a statement to place himself right before the court and bar; that he did not appear for the company; that he had performed service for it, at an agent's request, in the matter of this loss, and a disagreement arose between him and the agent as to the amount of pay for services, which was compromised, and he retired from the company's service; and further stated that he did not understand why defendant was not appearing, and he was satisfied that there must be something wrong, and asked the court to continue the case to a later day of the term, so that he could telegraph the company as to the situation, and he was afraid the company was depending on him, and was satisfied the company did not know of the pendency of the suit; but the plaintiff pressed a trial. He did telegraph, and was answered by the agent, "No notice of suit ever served on me," as did the general office also, and was requested to defend the suit; but the verdict and judgment had been rendered. This attorney swears that he has no doubt, from the letters, papers, etc., that the company was

ignorant of the suit. The company took prompt steps, but it was too late. This appeals strongly for a new trial. The defendant has, as a matter of fact, never had a trial, and we ought to lean in favor of giving it one, as it is not a decision final in its favor, but only accords it what it should have,—a fair trial. We think that the court should have allowed a few days' time to notify the company. No longer time was asked.

Reversed.

CHARLESTON.

BARTLETT v. TOWN OF CLARKSBURG.

45	398
47	649
45	393
157	434

Submitted June 6, 1898—Decided November 30, 1898.

1. MUNICIPAL CORPORATIONS—*Liability—Fireworks—Municipal Officers.*

An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets by a crowd of citizens, although such acts be done with the knowledge and consent of the mayor, council, police, and other officers of such corporation. (p. 395).

2. MUNICIPAL CORPORATIONS—*Negligence of Officers—Damages.*

As to the powers and functions of an incorporated town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein. (p. 397).

Error to Circuit Court, Harrison County.

Action by R. B. Bartlett against the town of Clarksburg. From a judgment sustaining a demurrer, plaintiff brings error.

Affirmed.

W. SCOTT, for plaintiff in error.

JOHN BASSEL and M. M. THOMPSON, for defendant in error.

McWHORTER, JUDGE:

R. B. Bartlett brought his action on the case in the circuit court of Harrison County, to recover damages against the town of Clarksburg for personal injuries sustained by plaintiff by reason of the discharge by private persons of firearms, squibs, rockets, and fireworks at a narrow place in one of the streets of said town, on the ground that the said fireworks were discharged by the consent and written permission of the mayor, and with the knowledge and consent of the council and police and other officers of said town, and that the said discharge of firearms, fireworks, etc., was of such a nature as to be a public nuisance, whereby the team of horses of plaintiff attached to his buggy became frightened and unmanageable, and beyond the control of plaintiff, and ran away, throwing plaintiff from his buggy seat, and badly injuring him, for which injuries plaintiff alleges said town is liable to him for damages. The declaration contains two counts. Defendant demurred to the declaration and each count, which being argued and considered, the court sustained said demurrers; and, plaintiff not desiring to amend his declaration, the same was dismissed, and judgment rendered in favor of defendant for costs. No ground of demurrer is contended for, except that the town is not liable, and that an action cannot be maintained against the town for the wrong complained of. The appellant cites *Speir v. City of Brooklyn*, 139 N. Y., 6, (34 N. E. 727), which is, as he claims, on all fours with the case at bar, where it is held that "a city is liable for injury to property by an explosion of fireworks constituting a dangerous public nuisance, when the display was made under a permit given by the mayor of the city acting under authority of a city ordinance." In the case under

consideration, it is not alleged in the declaration that the written permit was granted by the mayor acting by virtue or under authority of an ordinance of the town. This is about the only particular in which the two cases differ. In *Speir v. City of Brooklyn* the judge says: "It is the settled doctrine of the courts that a municipality is not bound merely by the assent of its executive officers to wrongful acts of third persons; nor could the mayor bind the city by a permit for the granting of which he has no color of authority from the common council, and which was not within the general scope of his authority." The case of *Speir v. City of Brooklyn* is supported by some other authorities; and I confess I am largely in sympathy with the decision in that case, and agree with Judge Okey as to the nuisance in the case of *Robinson v. Greenville*, 42 Ohio St., 630, where he says: "That firing of cannon in a public street of a municipal corporation, except in case of imperative and urgent necessity, is an intolerable nuisance and that all persons engaged in such unlawful act are personally liable for all damages caused thereby, are propositions concerning which there is no room for difference of opinion. But a very different question is presented when it is attempted to fasten liability for such injuries on a municipal corporation."

In the case at bar the acts complained of are equally as great a nuisance as the firing of cannon, as stated in above case. Appellee contends that "the law in this State has been settled in at least two cases upon all fours with this case," viz. *Mendel v. City of Wheeling*, 28 W. Va., 233, and *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va., 299, (12 S. E. 707). Cooley on Torts (pages 738, 739) says: "Municipal corporations are to be considered—First, as parts of the governmental machinery of the state, legislating for their corporations, and planning and providing for the customary local conveniences of their people; second, as corporate bodies, through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves, or as the state has imposed upon them; and, third, as artificial persons owning and managing property. In the last capacity they are chargeable with all the duties and obligations of other

owners of property, and must respond for creating or suffering nuisances, under the same rules which govern the responsibility of natural persons. * * * For taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever except the political responsibility to their corporations and to the state. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore one shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire, or because cattle are not prohibited from running at large, or because coasting in the highways is not prevented, or because the operation of an ordinance which prohibits the explosion of fireworks in the city is temporarily suspended, or because provision is not made for lighting the streets. * * * Neither is a municipal corporation responsible for the failure of its officers to discharge properly and effectively their official duties; for in respect to these the officers are not properly the servants or agents of the corporation, but act upon their own official responsibility, except as they may be specially directed by the corporate authority." In *Robinson v. Greenville, supra*, (Syl. point 4): "An assemblage of disorderly persons, after having been engaged for several hours in discharging a cannon in a public street of a municipal corporation, seriously injured a resident of the corporation, himself without fault, by one of such discharges. Held, that such corporation is not liable for the injury, although the statute provides that the council shall have the care, supervision, and control of the streets, 'and shall cause the same to be kept open and in repair, and free from nuisance' (Rev. St. Ohio, § 2640); and it will make no difference that the authorities of such corporation, with knowledge of such firing, took no steps to prevent the same." Also *Borough of Norristown v. Fitzpatrick*, 49 St., 121, (Syl. Pa.

points 1 and 2): "(1) N. was injured, while crossing a street in a borough, by the firing of a cannon by a crowd of citizens. In an action against the borough to recover damages for the injury, the jury, in a special verdict found that the cannon had been fired at short intervals for several hours, at various points in the borough; that it was not fired at any public or authorized celebration; that a policeman was standing by, and made no effort to stop the firing. A special act of assembly authorized the borough to appoint policemen, remove nuisances, etc. Held, that the borough was not liable. (2) Admitting that such an assemblage was a nuisance, and that of the worst kind, it is one that a municipal corporation cannot abate by the use of ordinary appliances, such as suffice for the removal of natural or material obstructions in or near a highway, and resort therefor must be had to the police; but for the doings or misdoings of those who compose this force the municipality is not liable." *Campbell's Adm'x v. City Council*, 53 Ala., 527: "The city is not liable for injuries resulting from violence, which the police, by diligent discharge of duty, might have prevented. Although appointed by the city, the police are *quasi* civil officers, for whose misfeasance or nonfeasance in office the city is not responsible, though they are personally answerable." *City of La Fayette v. Timberlake*, 88 Ind., 330: "A municipal corporation is not liable for a personal injury occasioned on its streets by persons making an unlawful use of its streets, as by coasting. A municipal corporation is not liable for failure to exercise governmental powers, as for failure to enforce the state laws or its own ordinances. A municipal corporation is not liable for the negligence of its police officers. They are not its agents, but public officers." *Faulkner v. City of Aurora*, 85 Ind., 130: "A city, after having adopted an ordinance prohibiting upon its streets, sports tending to produce personal injury, is not liable for a collision occurring upon a street, whereby a traveler was injured, as the result of coasting for sport, though the sport was carried on by crowds, publicly, in the presence of its officers and police, to the obvious danger of persons using the streets." *Ball v. Town of Woodbine*, 61 Iowa, 83, (15 N. W. 846): "Where fireworks are dis-

charged within the limits of an incorporated town, in violation of the ordinances of the town, whereby one is injured, the town is not liable for such injury, notwithstanding the town council and officers of the town and a majority of the citizens actively participate in the discharge of the fireworks, and the town, by its officers, makes no attempt to stop the proceedings." *Hill v. City of Charlotte*, 72 N. C., 55: "A municipal corporation having power, under its charter, to make ordinances for the safety of its property in the city, suspended for a short time the operation of an ordinance forbidding the use of fireworks within the city. During such time, plaintiff's building was set on fire, and destroyed, by fireworks negligently used by boys. Held, that the corporation was not liable for such destruction." Dill. Mun. Corp. § 753: "A municipal corporation is not liable to an action for damages, either for the nonexercise of, or for the manner in which, in good faith, it exercises, discretionary powers of a public or legislative character." *Wheeler v. City of Cincinnati*, 19 Ohio St., 19; *Forsyth v. Mayor, etc.*, 45 Ga., 152; *Fisher v. City of Boston*, 104 Mass., 87.

Authorities might be multiplied indefinitely. While the decisions are not all on one side yet the great weight of the authorities, including those of our own State, is with the action of the circuit court in this case. In *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va., 299, (12 S. E. 707, Syl. point 1), it is held that, "as to the powers and functions of a town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein." *Mendel v. City of Wheeling*, 28 W. Va., 233. The judgment will have to be affirmed.

Affirmed.

CHARLESTON.

PARKER *et al.* v. BRAST *et al.*

Submitted April 9, 1898—Decided November 30, 1898.

1. CO-TENANCY—*Sale for Taxes—Tax Title—Trusts.*

Where a co-tenant permits the common property to be sold for taxes, and directly or indirectly secures the title in his own name, his deed will be avoided at the instance of his co-tenants, or he will be held to be a trustee holding the legal title for their mutual benefit. (p. 402).

2. CO-TENANCY—*Purchase of Common Property—Notice.*

A purchaser of the common property from such co-tenant, with notice of the character of his title, will be limited in his holding to the actual interest of his grantor in such property. (p. 402).

3. CO-TENANCY—*Grantor—Deed—Ouster—Adverse Possession—Statute of Limitations.*

A grantor claiming the common title of the co-tenancy under a deed from one of the co-tenants is under the burden of showing some notorious act of ouster or adversary possession, which has ripened into perfect title by its unbroken continuation during the statutory period of ten years, with the full knowledge and acquiescence of the disseised co-tenants. (p. 403).

4. CO-TENANCY—*Possession—Laches—Disseisin—Lapse of Time—Ouster.*

As the possession of one co-tenant is the possession of all, laches, acquiescence, or lapse of time cannot bar the right of entry of a co-tenant until the actual disseisin has been effected by some notorious act of ouster brought home to his knowledge (p. 404).

5. CO-TENANCY—*Deed—Ouster—Adverse Possession.*

The making of a deed for the whole property by a co-tenant to a stranger is not such act of ouster, unless actual adverse possession is taken thereunder. (p. 403).

45	399
50	600

45	399
52	636

45	399
53	528

45	399
59	295
59	674

45	399
f61	456
61	459
61	464
f61	466
61	467

Appeal from Circuit Court, Wetzel County.

Bill by William W. Parker and others against M. A. Brast and others to recover possession of land claimed in co-tenancy. From a decree in favor of complainants, defendants M. A. and Amos E. Brast appeal.

Affirmed.

THOMAS P. JACOBS and GEORGE H. UMSTEAD, for appellants.

ROBERT McELDOWNEY, S. B. HALL, and J. C. PARKER, for appellees.

DENT, JUDGE:

William W. Parker and others against M. A. Brast and others, from the circuit court of Wetzel County. In the year 1858, William W. Parker, John W. Horner, and R. W. Lanck were the joint owners in fee simple of several large tracts of land lying in Wetzel County, held by them under patent from the State of Virginia. R. W. Lanck was a resident of the county, and was intrusted by the other co-tenants with the supervision of these lands. He permitted the same to be returned delinquent for the year 1859, and in the year 1860 they were sold, and purchased by J. D. Ewing, who, on the same day he received his deed, conveyed them to R. W. Lanck, in consideration of one hundred dollars. Some time afterwards, Lanck disposed of a large portion of these lands to other parties. In the year 1869, William W. Parker and John W. Horner filed their bill against R. W. Lanck and his purchasers, claiming to be co-tenants in said lands, but asking that the sales made by said Lanck be ratified and confirmed, and that he be required to account for the proceeds, and pay to the complainants each one-third thereof. This suit was never finally heard and determined. In the year 1884 said Lanck conveyed the balance of said lands, the title of which still remained in him, to his son Edgar W. Lanck, in consideration of one dollar and natural love and affection. Without taking possession of the lands or knowing anything regarding the quantity or boundaries thereof, on the 11th day of April, 1893, Edgar W. Lanck conveyed the same to Amos E. Brast and Michael A. Brast, in consideration of

two hundred and fifty dollars,—one hundred and fifty dollars cash, and the residue for surveying done and taxes paid. In October, 1896, the plaintiffs filed their bill to have themselves declared co-tenants in this tract of land, supposed to contain not less than one thousand acres. In the meantime, the said Brasts had executed leases on said land to the South Penn Oil Company and the Eureka Pipeline Company, which plaintiffs desire, so far as they are concerned, to be ratified and confirmed. The Brasts answered, claiming to be *bona fide* purchasers for value without notice, that plaintiffs had lost their right by laches, by acquiescence and waiver in the former suit instituted, and by the statute of limitations, and adverse possession by respondents and those under whom they claim for more than ten years. Edgar W. Lanck answered, claiming adversely to plaintiffs' pretensions, and claiming that his deed was for valuable consideration, namely, the support of his father and mother. He alleges that the land was in a state of nature, and therefore in the actual possession of no one until after his deed to the Brasts, which he claims was obtained from him through fraud on their part. Some depositions were taken, and some redemption tax receipts, against the objection of defendants, were admitted in evidence. The circuit court held that the cotenancy between Parker and Horner's heirs and Lanck and those claiming under him still existed, and that the plaintiffs were entitled to the two-thirds of said land. From this decree the Brasts alone appeal.

The appellants seemingly rely on the case of *Bryant v. Groves*, 42 W. Va., 16, (24 S. E. 605), as decisive of this case. This would undoubtedly be true if it were not for the settled principles of cotenancy here existent, which were not present in the former decision. On the contrary, this case is governed by the principles announced in the case of *Cecil and Hall v. Clark*, 44 W. Va., 659, (30 S. E. 216). The tax purchase and after-acquirement of title to this land by Lanck, by reason of the sale to Ewing, in 1860, under the decisions of this Court, was nothing more than a mere redemption, and the legal title stood in his name in trust for his co-tenants. *Ballou v. Woods*, 27 W. Va., 58; *Curtis v. Borland*, 35 W. Va., 124, (12 S. E.

1113). See point 4 in case of *Cecil and Hall v. Clark*, where it is held: "A tax purchase by one tenant in common of the land owned in common is but a redemption, and inures to the benefit of the co-tenancy. So, with a purchase under a sale of land under the common title forfeited for taxes, and sold by commissioner of school lands." The co-tenant in charge could not oust his co-tenants by permitting the land to be returned delinquent and sold, and then buying the same at a nominal price from the tax purchaser, as such conduct on his part simply establishes a collusive attempt to acquire the title of his co-tenants without their knowledge. There is nothing to show that the absent co-tenants were aware of the deed to their co-tenant until they brought their suit, in 1869, to have the proceeds of the sales made partitioned between them; and in such suit they treated him as holding the legal title in trust for them just as the law would treat him. Had he taken actual adverse possession of the land, and thus completely ousted his co-tenants, and so held the same for the period of ten years with their knowledge, the ouster would have been complete, and the co-tenancy would have ceased. But actual possession of the land in controversy was not taken until after the deed from Edgar W. Lanck to the Brasts, in 1892, less than four years from the bringing of this suit. These parties all had constructive notice of the condition of the title from the records, and they cannot claim to be innocent purchasers for value without notice. *Pillow v. Improvement Co.*, (Va.) 23 S. E. 32, approved in *Cecil and Hall v. Clark*, above cited. Edgar W. Lanck, by his deed, under this last decision, took only the title of his father, and therefore he became a co-tenant with the plaintiffs, as no perfect disseisin has been shown as to them; and his grantees took in the same manner, as the disseisin could not become perfect until the statutory period of ten years of actual, notorious, and adverse possession intervened, with notice brought up to the ousted co-tenants. *Davis v. Settle* 43 W. Va., 17, (726 S. E. 55).

These defendants insist that this suit is barred for the reason that William W. Parker and John W. Horner filed their bill heretofore referred to, in 1869, without attacking the tax deed or the purchase of Lanck from Ewing,

but apparently ratified the same, and asked that Lanck, in the sales made by him be treated and held to account as their trustee, and claim that this position is entirely inconsistent with that of the present plaintiffs. While it is true that the plaintiffs did not at that time ask to have said deeds canceled as a cloud on their title, they did ask that Lanck be regarded as a trustee, holding the legal title for their benefit, which is the same thing in substance, except as to innocent purchasers for value without notice. If by permitting the deeds to remain uncanceled, and the title to remain in Lanck unchallenged, some innocent person had been led to purchase the property and pay full value therefor, without notice of their claim of co-tenancy, they might have been barred as to the lands, but not as to Lanck. Such is not this case. The purchasers here affected were neither for value nor without notice, as the paper evidence and the admission of the parties in their pleadings fully establish. The appellants purchased this property for less than two hundred and fifty dollars, which was certainly but a nominal price compared with its real value; and they say they had the title examined, and were fully aware of the same at the time of the purchase. They therefore knew that Lanck's title depended upon a tax sale made during the time of great confusion on account of the war, and that he had been a co-tenant with the plaintiffs and those under whom they claim; and it must be presumed they were fully advised as to the law of co-tenancy, and knew that the purchase of Lanck inured to the benefit of his co-tenants until actual disseisin by him had become perfect by time, under the statute of limitations. This put them on their guard and inquiry as to the true state of the co-tenancy.

The present suit is in perfect harmony with the former one, except the subject-matter is different, as both seek to treat Lanck and his grantees as trustees, holding the legal title for the benefit of the co-tenancy. In the former suit they were willing that the sales be confirmed, and the proceeds be partitioned, because they were made for value. In the later suit they ask that the sales to Edgar W. Lanck and the Brasts be limited to the original Lanck one-third interest, because the sales were not for value

without notice. So, the doctrine of estoppel does not apply to this case either by way of laches or inconsistent positions on the part of plaintiffs. If the first suit had been heard on its merits, and determined adversely to the plaintiffs' claim, it would have been a bar to the present proceedings. The questions of title are the same in both suits. But, as clearly appears from the record, such suit was never finally heard, determined, or dismissed, and hence it cannot bar the present suit. *Watson v. Watson*, (decided at this term) 31 S. E. 939. The relation of trust and confidence is such between co-tenants that it would be inequitable to permit one of them to do anything to the prejudice of the others in reference to the common property. For one co-tenant in any way but the most open and avowed, with the full knowledge of those in common interest with him, to try and obtain the common title, has been held to be a breach of trust, amounting to a fraud against the rights of the co-tenancy. The only way to destroy a co-tenancy is either for part to buy out the others, or to exclude them from participation therein by such open and notorious acts of ouster as amount to a disseisin, and which has ripened by actual adverse possession into perfect title under the statute of limitations. The present is not such a case. This conclusion renders it unnecessary to consider appellants' objections to the depositions and tax receipts, as they in no wise affect the determination reached. The decree is affirmed.

Affirmed.

CHARLESTON.

SCHWARTZ v. SHULL.

Submitted September 8, 1898—Decided Nov. 30, 1898.

45	405
46	368
45	405
51	181
52	176
45	405
d64	294

1. MASTER AND SERVANT—*Ordinary Care—Dynamite.*

The measure of care imposed upon the master for the safety of his servant in the use of dynamite is that ordinary care which reasonable and prudent men would and do exercise under like circumstances. *Zinc Co. v. Martin's Adm'r*, 93 Va., 791. (p. 406).

2. NEGLIGENCE—*Injury—Proximate Cause.*

The proximate cause of an injury is the last negligent act contributing thereto, and without which such injury would not have resulted. (p. 409).

3. PROVINCE OF COURT—*Proximate Cause—Evidence.*

Where the evidence is not contradictory, proximate cause is a question of law to be determined by the court, and not a question of fact to be submitted to a jury. (p. 409).

4. INSTRUCTIONS—*Negligence—Evidence.*

A person may admit moral guilt of a wrong in cases where he is not legally liable; hence an instruction to the effect that, although the defendant admitted his negligence caused the injury, the plaintiff is not entitled to recover, unless the evidence including such admission shows that the defendant was negligent, and that such negligence was the proximate cause of the injury, is not improper, and, when asked, should be given. (p. 410).

5. INSTRUCTIONS—*Negligence—Proximate Cause—Error.*

An instruction to the effect that if the jury believe that the defendant was negligent, and that such negligence was the proximate cause of the injury complained of, they must find for the plaintiff, although they believe another person's negligence intervened between the negligence of the defendant and the injury, is erroneous (p. 412).

Error to Circuit Court, Mineral County.

Trespass on the case, by A. F. Schwartz against L. E. Shull and others. There was a judgment for plaintiff and defendant brings error.

Reversed.

C. WOOD DAILY, for plaintiff in error.

F. M. REYNOLDS, for defendant in error.

DENT, JUDGE:

An action of trespass on the case, instituted by A. F. Schwartz against L. E. Shull and others, resulted in a verdict for the plaintiff for the sum of one thousand two hundred dollars. Defendant Shull appeals, and relies on the following assignment of errors: "First. Overruling petitioner's demurrer to the plaintiff's amended declaration. Second. Refusing to give petitioner's instruction A, as set out in bill of exception No. 1. Third. Giving the three instructions, and each of them, at the instance of the plaintiff, as set out in bill of exception No. 2. Fourth. Refusing to give, at the instance of petitioner, instructions Nos. 3, 4, 7, 8, 11, 13a, 14, 17, and 18, as asked, and as set out in petitioner's bill of exception No. 3, and in modifying Nos. 7 and 14, as set out in said bill of exception. Fifth. Overruling petitioner's motion in arrest of judgment and for a new trial, as set out in defendant's bill of exception No. 4. Sixth. Overruling petitioner's objection to that part of the testimony of Mary Schwartz, wife of the plaintiff, set out in petitioner's bill of exception No. 5, and in refusing to exclude such evidence from the jury."

As cause for demurrer, defendant says that it is not negligence to carry dynamite and caps in sawdust, in an exposed condition, on a locomotive engine, unprotected from sparks thrown off by such engine. The result of the accident is a sufficient answer to this. It was a dangerous explosive, carried in a dangerous place, in close proximity to defendant's employes on such engine, by his direction. A person of ordinary prudence, fully advised of the dangerous character of dynamite, would not undertake such risks. In the case of *Zinc Co. v. Martin's Adm'r*, 93 Va., 791, (22 S. E. 869), the law is stated correctly to be: "The

measure of care imposed upon the master for the safety of his servant in the use of dynamite is that ordinary care which reasonable and prudent men would and do exercise under like circumstances,"—such care being regulated to a great extent by the dangerous character of the article; a stick of dynamite requiring more care than a potato, although both might be dangerously handled.

Petitioner's first instruction, which is in these words: "The court instructs the jury that the evidence in this case is not sufficient to sustain the issue on the part of the plaintiff, and they should find a verdict for the defendant,"—is virtually nothing more than a demurrer to the declaration. From the plaintiff's standpoint, the declaration has been fully proven; and the allegation that the evidence is insufficient, although it fully tends to sustain every averment of the declaration, being, in effect, a demurrer to the evidence, is equivalent to saying that the plaintiff has no cause of action. The court, therefore, could not do otherwise than to hold such instruction bad. The plaintiff's evidence establishes the facts to be as follows: That the defendant Shull placed some explosive caps in an open box containing eight sticks of dynamite placed in sawdust, and directed an employe by the name of Davis to take the same to the tram road, and put it on the engine; that Davis, in obedience to such direction, set such open box on the tender; that after the engine, to which several trucks were attached, had proceeded some distance, the engineer noticed the sawdust was on fire, and called to the plaintiff, who was riding on the tender as an employe of the defendant to throw the box off. He promptly did so, and while he was in the act of doing it the dynamite exploded, and seriously injured him. This evidence is certainly sufficient to go to the jury on the question of negligence, and it would be for it, and not the court, to say whether the defendant, in directing the explosives to be placed on the engine in their exposed and dangerous condition, was exercising the ordinary care of a prudent man towards his employes. As to whether defendant Shull directed Davis to put the dynamite on the engine is a disputed question, the plaintiff's evidence tending to prove that he did, while the defendant's evidence

tends to the contrary; thus raising a question for the jury to determine.

Taking up the numerous instructions refused to the defendant, we find the court refused to give instruction No. 3, which is as follows: "The court instructs the jury that even if they believe, from the evidence that defendant Shull put the caps spoken of in the evidence into a box with dynamite, and told the witness John Davis to carry it over to the train and put it on the engine, and said Davis put the same on the tender, and though the jury may believe that such action on the part of said Davis was negligent, and that such negligence was the proximate cause of the plaintiff's injuries, yet that does not constitute negligence on the part of said Shull." This instruction tries to make a distinction between the tender and the engine, which is untenable, as the tender is a necessary part of the engine, and is that part on which it was shown the employes were in the habit of carrying articles for the company's use. Such a distinction is a mere quibble, especially in the face of the fact that the defendant denies telling Davis to put the box on the engine.

Instruction No. 4, refused, is as follows: "The court instructs the jury that if they believe from the evidence that defendant Shull told witness John Davis to take the box with dynamite and caps in it over to the tram road, and that said Davis took the same over, and put it on the tender, and that to do so was negligence, and that such negligence caused the plaintiff's injury, yet such negligence was the negligence of said Davis, a fellow servant of the plaintiff, and that for such negligence the defendant is not responsible." This instruction was also properly refused, as the jury had the right to infer from the evidence in the case that Davis, in placing the box on the tender, was acting in obedience to the instruction of the defendant, and not in disobedience thereto.

Instructions 7, 11, 17, and 18 are as follows: (7) "The court instructs the jury that if they believe from the evidence that the plaintiff, by his own negligence, or want of care and prudence, contributed directly to the injuries which he received, then they should find a verdict for defendant Shull, although they may believe that he also was

negligent in the matter." (11) "The court instructs the jury that if they believe from the evidence that the plaintiff's injuries resulted from the explosion of the dynamite when the plaintiff threw it from the tender, or when it struck the ground or rocks, and that the said plaintiff knew, or ought to have known, that it was dangerous to handle said dynamite in that condition, and the jury further believe from all the evidence in the case that it was dangerous and that it was imprudent and careless in him to do so, then they should not find a verdict in favor of the plaintiff." (17) "The court instructs the jury that, though they may believe from the evidence, even under the instructions of the court, that the defendant Shull was guilty of negligence, yet if they further believe from the evidence that the plaintiff was guilty of carelessness or imprudence that contributed directly to his injuries, they should find for the defendant." (18) "The court instructs the jury that if they believe from the evidence that it would have been less dangerous to throw the dynamite off on the upper side of the road than on the lower side, and that the plaintiff knew that fact, or should have known it, and yet threw the box off on the upper side, when he could have thrown it off on the lower side, then the plaintiff is not entitled to recover." These instructions raise questions of contributory negligence. This does not appear in the case, for the undisputed evidence plainly frees plaintiff from all contributory negligence. It shows he was endeavoring to save the defendant's property and the lives of himself and others from destruction, and he did, under the circumstances, only what a brave man could do, while a coward might have fled, and left the property of his employers, and his fellow servants, to their uncertain fate. Under the circumstances it was the duty of the court to settle the question of contributory negligence in favor of the plaintiff, as the evidence justifies no other course. Instruction No. 7, modified, which is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, in taking up the box of dynamite, and throwing it from the tender, showed a want of reasonable care and prudence, and that such want of care and prudence was the proximate cause of the injuries he received,

then the jury should find for the defendant,"—was more than the law entitled the defendant to have on the question of contributory negligence. Instruction No. 8 is liable to the same objections as instructions Nos. 3 and 4. It is as follows: "The court instructs the jury that if they believe from the evidence that the defendant Shull, after he put the caps into the box with the dynamite, told the witness Davis to take the box down to the tram road, and put it on the engine, or told him to take it over to the tram road without telling him what to do with it after getting it there, and believe that plaintiff, Schwartz, and others working on construction of tram road, were going up on the train, together with Charles Bender, acting as engineer, and Davis as fireman, in charge of the logging train, then said Shull is not liable in this case because he failed, after he got to the tram road, and before or after starting, to ascertain where said dynamite or caps had been placed for carriage; and is not liable in this action because they were placed together, by said Davis, on the back of the tender, even if the jury believe that it was negligence in said Davis to put them there, and that the plaintiff's injuries resulted directly from such negligence."

Defendant's instruction 13a is as follows: "The court instructs the jury that, even if they believe from the evidence that defendant Shull, after the explosion, and injury of the plaintiff, stated or admitted that he was to blame in the matter, or that it was his fault, yet that does not entitle the plaintiff to recover unless the evidence in the case before the jury, including such statement of said Shull, if the jury believe that it was made, under the instructions given by the court, shows that the said Shull was negligent, and that his negligence was the direct and proximate cause of plaintiff's injuries." This instruction should have been given, for a person may acknowledge that he is morally responsible for an act when not legally so. He may feel, on account of sensitiveness, that by using more prudence than the law requires, or by having prevented a remote cause, he might have rendered the proximate cause of the accident impossible.

Instruction No. 14, refused by the court, and No. 14, as modified by the court, applied alone to the allowance of

doctor's bills; No. 14 being that no such bills should be allowed, and the modified instruction allowing such as had been established by proof. The declaration alleges, among other things, that the plaintiff "incurred great and heavy expense in his endeavor to be cured of the said injuries, which expense amounted to the sum of——dollars." The court therefore did not err in this instruction, as plaintiff had the right to recover his curative expenses, together with his other damages, if the same did not exceed the amount claimed, to wit, \$5,000. Nor is instruction 14, as modified, inconsistent with instruction No. 1 given for plaintiff. No. 1 tells the jury to allow him his medical expenses, while No. 14, as modified, limits the same to the amount proved to have been expended.

Plaintiff's instructions Nos. 1 and 3, which are as follows, to wit: (1) "The court instructs the jury that, if they find the issue for the plaintiff, Schwartz, in determining the measure of damages they may take into consideration the mental and physical pain and suffering endured by the plaintiff since he received the injury complained of, in consequence thereof, the character and extent of such injury, and its continuance, if permanent, together with his loss of time and service, and his disability, if any, resulting from said injury, to earn a livelihood for himself and family, and his necessary expenses for medicine and medical attention; and may find for him such sum as, in the judgment of the jury under the evidence, will be a fair compensation for the injury, not to exceed the sum of five thousand dollars." (3) "The court instructs the jury that if they believe from the evidence that the plaintiff, Schwartz, was injured by the explosion of dynamite, as complained of in the declaration, and that the negligence of the defendant Shull was the proximate cause of the injury received by the plaintiff, then they must find a verdict for the plaintiff,"—properly propound the law, and were rightly given.

Plaintiff's instruction No. 2 is as follows, to wit: "The court instructs the jury that if they believe from the evidence that the defendant Shull was guilty of negligence in putting the dynamite mentioned in the evidence in a box, and in with it caps for exploding such dynamite, and

putting sawdust on it, without the box so packed being covered or protected, then they must find for the plaintiff, if they believe such negligence of the defendant to have been the proximate cause of the injury complained of, although they may further believe from the evidence that the witness Davis was negligent in placing said box so unprotected on the tender of the engine." This instruction should not have been given, for it is misleading, in that it submits to the jury the question of determining whether the defendant's negligence in putting the caps and dynamite together, packed in sawdust, in an uncovered box, was the proximate cause of the plaintiff's injury. This is a legal question, and should have been determined by the court. The legal definition of the word "proximate" is very hard for those unlearned in the law to understand, and the jury might easily be misled into the belief that any act of negligence, however remote, was the proximate cause of an accident. Cooley, *Torts*, 76, states the law to be: "If the original act was wrongful, and would naturally, according to the natural course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But, if the original act only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." The instruction under consideration positively violates this law, for it tells the jury that, if they believe the defendant's negligence was the proximate cause of the plaintiff's injury, they must find for the plaintiff, "although they may further believe from the evidence that the witness Davis was negligent in placing said box, so unprotected, on the tender of the engine." Although it may be carelessness to place explosive caps and dynamite together, packed in sawdust, yet, if not then in an uncovered condition, exposed to fire, no accident could possibly follow. Now, if Davis' conduct in placing the box uncovered on the tender, where it was exposed to sparks from the engine, could be regarded as innocent, and not

negligent, then the plaintiff's carelessness might be held to be the proximate cause of the accident. At the time the box was turned over to Davis it was not dangerous, because not in an exposed condition. If he had negligently applied fire to the box before he reached the tram road, he could not have recovered for an accident resulting, for his own negligence would have been the proximate cause thereof. But if he had not been aware what was in the box, and he had accidentally dropped a spark therein, and caused an explosion he could have recovered for injury occasioned thereby, for he is innocent of wrong or negligence. The proximate cause of the injury in this case was not the placing the explosives, packed in sawdust, in a box together, but it was the placing of such box, uncovered, on the tender of the engine, where it was exposed to heat and sparks, and liable to explode to the injury of the employes of the defendant transported on such engine to their place of work. Had the box been carefully covered, or placed on some other, unexposed part of the train, no accident would have happened, although it might have been considered careless to pack explosive caps and dynamite in the same box, and cover them with sawdust. Before they will explode otherwise than by concussion, fire must reach them in some way,—either by outside application or spontaneous combustion. The latter is not claimed to have resulted. In the case of *Foley v. Railway Co.*, 48 Mich., 622, (12 N. W. 879), it was held that a railroad company transporting nitroglycerin in the customary way was not liable to its employes for injuries occasioned by the explosion thereof as this was a risk incidental to their employment. The transporting of these explosives on the tender of an engine in an exposed condition is extremely dangerous and is not the customary way, and cannot be considered a risk assumed by innocent employes. Had the witness Davis been the injured person, he certainly could not have complained, for his negligence contributed to the accident.

On the subject as to whether Davis, in placing the box on the tender, was acting under the direction of the defendant, the evidence is contradictory, and it was, therefore, a question for the jury to determine. But the in-

struction takes this question away from the jury by telling them they must find for the plaintiff, without consideration of the question as to who was guilty of negligence in exposing the explosives to the sparks from the engine. This is a matter of vital importance, and the very gist of this case; and for this reason it will have to be reversed, and a new trial awarded.

The evidence of Mrs. Schwartz that the defendant said "he did not fault Mr. Schwartz for throwing the dynamite off; he said it was all right," as heretofore shown, is immaterial, as Schwartz plainly did only what a brave man could do, under the circumstances, in an effort to save the property of the defendant and the lives of his employes. For doing this no man could "fault" him; much less those he was endeavoring to serve. The law does not convict a man of contributory negligence because he fails to preserve himself to the injury of others through selfishness and cowardice. For the refusal to give defendant's instruction 13a, and the giving of plaintiff's instruction No. 2, the judgment is reversed, the verdict of the jury set aside, and a new trial is awarded.

Reversed.

CHARLESTON.

STATE v. SPONAUGLE *et al.*

Submitted Feb. 2, 1897—Decided Nov. 30, 1898.

1. CONSTITUTIONAL LAW—*Taxation—Forfeiture—Due Process of Law.*

That clause of section 6, Art. XIII, of the State Constitution, forfeiting land for the failure of the owner to enter it for taxation, is not in violation of that clause of the fourteenth amendment to the federal constitution restraining states from depriving any person of life, liberty, or property without due process of law. (p. 417).

2. CONSTITUTIONAL LAW—*Due Process of Law.*

The fourteenth amendment to the federal constitution does not itself define "due process of law." What was such before its adoption continues such. It does not prohibit a state from future, new legislation, action, or proceedings necessary, in its judgment, in the administration of its government, so it bear alike on all similarly circumstanced, and be not unusual, oppressive, or arbitrary action, assailing the essential rights of the person. (p. 424).

3. DUE PROCESS OF LAW—*Taxation.*

Due process of law does not always require judicial hearing. It does in matters of purely judicial nature, but not in matters of taxation or matters purely administrative. (p. 424)

4. DUE PROCESS OF LAW—*Supreme Court of United States.*

It is with the Supreme Court of the United States to determine finally whether legislation or action under state authority is due process of law. (p. 424).

5. DUE PROCESS OF LAW.

What is due process of law? (p. 418).

6. LACHES—*Tax Sales—Possession.*

Laches will not bar a landowner from assailing a tax sale of

45	415
45	432
45	415
146	132
45	415
50	438

45	415
54	812
45	415
55	482

45	415
56	472
56	477
56	487
57	499

45	415
59	633
60	698

45	415
63	66

45	415
164	603
164	607
64	704

45	415
166	2
166	5
66	237

his land, when there is no actual possession under the tax title. (p. 431).

7. *LACHES—Statute of Limitations*

Laches is not imputable to the State. Statutes of limitation now run against the State. (p. 431).

8. *TAX SALES—Warranty—Entry for Taxation.*

A sale of land for taxes is without warranty by the State, and it is not prevented thereby from setting up its right under forfeiture for omission to enter the land for taxes either before or after the tax sale. (p. 432).

9. *TAX SALES—Estoppel in Pais—Entry for Taxation.*

If a sale for taxes is made and the tax purchaser pays taxes thereafter, the receipt of such taxes will not operate, on the theory of *estoppel in pais* by conduct, to prevent the State from setting up against the tax purchaser a title to land, by forfeiture, for failure of the former owner to enter it for taxation subsequent to or before the tax sale. If the tax title be valid, it would prevent such forfeiture for taxes after the tax sale from its own force, not on the theory of estoppel. (p. 432).

10. *TAX SALES—Entry for Taxation—Forfeiture.*

A sale of land for taxes, valid to pass title of the owner, will prevent its forfeiture for failure to enter it for taxes in the name of the former owner for years subsequent to the tax sale. (p. 348).

11. *TAX SALES—List of Sales.*

An omission, in a list of sales of land for taxes, to state the estate of the owner, will not annul the tax deed. (p. 433).

Appeal from Circuit Court, Randolph County.

Suit by the State against G. W. Sponaugle and others.

Decree for plaintiff, and defendants appeal.

Reversed.

FRANK WOODS, for appellants.

FLICK & WESTENHAVER, for the State.

BRANNON, PRESIDENT:

This was a chancery suit in the circuit court of Randolph County, in the name of the State, against Sponaugle and others, to sell a tract of one thousand two hundred acres of land patented by Virginia to Jacob Sponaugle in 1852, the State claiming title by reason of forfeiture of the land to the State because of its omission from the tax books for five successive years subsequent to 1872. Jacob Sponaugle

conveyed the land to his children, and they were made defendants, as also E. A. Cunningham, who claimed interests in the land by purchase from some of them. The answer of the children of Sponaule admitted the forfeiture and the liability to sale. Cunningham filed a petition setting up his interests, admitting the forfeiture, and asking to be allowed to redeem the land. This petition and cross bill attacked and sought to set aside a tax deed, and title under it, of the Condon-Lane Boom & Lumber Company. This company was made a defendant to the State's bill, as claiming title to the land; alleging that its claim was void and ineffectual against the State's title under the forfeiture, and that the land was liable to sale under its title by forfeiture. The Condon-Lane Boom and Lumber Company demurred to the bill, and answered setting up that its claim to the land was based on a sale to Cresap in 1871 for taxes for years prior thereto delinquent in the name of Jacob Sponaule, which tax title had come by conveyance to it, and that this sale rendered the land not taxable after 1871 to Sponaule, but to Cresap and those claiming under him, and that taxes had been charged and paid in their names for the years in which it was omitted in Sponaule's name, and for which the forfeiture was alleged to exist. It claimed that, if the land was forfeited, it took the benefit of the forfeited title, by reason of alleged possession under the color and claim of title arising from said tax deed and payment of taxes. The decree held the land forfeited, that the lumber company had no title, that its tax title was void, and allowed Cunningham and others claiming interests under Sponaule to redeem from the forfeiture. The lumber company appeals.

The demurrer and answer of the lumber company challenge the title of the State as conferred by forfeiture, and assert that it had no title under which to attack said company, and is not entitled to sell the land; and this on the theory that section 6, Art. XIII, of the West Virginia Constitution is repugnant to Art. XIV of amendments to the Constitution of the United States, in its provision, "nor shall any state deprive any person of life, liberty or property without due process of law." If this is so, the State has no title to the land. No definite definition—none but

the most general—has been or can be given of “due process of law.” The best the courts can do is to say, in each case as it arises, whether a given act or proceeding in the particular matter is due process of law. It depends how the question arises; that is, upon the matter or transaction involved. *Davidson v. New Orleans*, 96 U. S., 97. What would be due process if done under the police power or taxing power might not be, in many cases would not be, if not done under either of those powers. 3 Am. & Eng. Enc. Law, 714. A horse may be lawfully seized and sold, without judge or jury, for taxes; but an individual or officer or court or legislature, without trial, generally could not do this. In *Davidson v. New Orleans*, 96 U. S., 97, Justice Bradley said: “In judging what is due process of law, respect must be had to the cause and object of taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found arbitrary, oppressive, and unjust, it may be declared to be not due process of law.” The clause of the State Constitution in question makes it the duty of the landowner to put his land on the tax books, and provides that “when for any five successive years after the year 1869, the owner of any tract of land containing 1000 acres or more, shall not have been charged on such books, with state tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vested in the state.” This provision is to be justified under the taxing power of the state. Its purpose was to raise revenue from vast quantities of land which had been persistently and intentionally omitted by the owner for years from the tax books, and escaped all taxation. What is the limit of the taxing power, except by express provision of the Constitution? It scarcely has any. It is so nearly unlimited from sheer necessity. It involves the operations, nay, the very existence, of government. It is an original power, inherent in every government. Cooley, Const. Lim., 587, does not lay it down too broadly as follows: “The power to impose taxes is one so unlimited in force, and so searching in extent, that the courts scarcely venture

to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden, which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the government affect more constantly and intimately all the relations of life than through the exactions made under it."

"The basis of all taxation is political necessity. Without taxes, there can be no revenue; without revenue, there can be no regular government." Burroughs, *Tax'n*, 1, 3. "All subjects over which the sovereign power of a state extends are objects of taxation." Justice Field said in *State Tax on Foreign-Held Bonds*, 15 Wall., 319: "It may touch property in every shape,—in its natural condition, in its manufactured form, and in its varied transmutations. * * * It may touch business in the almost infinite forms in which it is conducted,—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited." In *Witherspoon v. Duncan*, 4 Wall., 210, the Supreme Court held that "the states, as a general rule, have the right of determining the manner of levying and collecting taxes on private property."

The states succeeded to the power of taxation of the English parliament after the Revolution, and possess it yet; and we must find in the federal constitution a plain—very plain—prohibition, to restrain this sovereign power, indispensable for our most numerous wants. From quotations above, we see that the state may fasten taxes upon any subject of property. Virginia, very long before the fourteenth amendment, adopted and steadily pursued the policy of holding the land itself liable for its taxes. By frequent acts she directed sale of land for taxes charged and unpaid. Acts of November, 1781; May, 1782; October, 1782; January 7, 1788; December 27, 1790; December 20, 1791; December 13, 1792; February 9, 1814; March 10, 1832; February 27, 1835; 1843; Code 1849; Acts 1859. By some

acts she forfeited lands charged with taxes not paid. Acts of December 27, 1790; December 13, 1792; January 29, 1803; January 20, 1807; April 1, 1831. Acts were passed forfeiting lands not entered on the tax books. Acts of February 5, 1810, and February 27, 1835. Many acts were passed from time to time, through years, giving further time to enter the lands omitted from the tax books, and to redeem lands charged with unpaid taxes. I refer to these many acts running through so many years to show a persistent, fixed policy of Virginia, in one mode and another, to hold the land itself amenable to taxes. West Virginia, since its birth, before the fourteenth amendment, pursued this policy, by adopting the Virginia law for the sale of lands for taxes, and after that amendment by her provision for such sale in her Code of 1868, and by the act of March 4, 1869, forfeiting land for nonentry for taxation. Thus, in Virginia and West Virginia these several modes of holding lands liable had become the "law of the land," as to this matter, before the amendment. Did that amendment come to overthrow this long-established law of the land? That amendment came to defend existing personal rights against unusual, arbitrary actions of the states; to save the citizen his essential rights against the exercise of unwonted, unusual, arbitrary, and unequal power by the state, operating to prejudice him in such essential rights; but I cannot think that it came to defend him against the exercise by the state of its usual powers, under its fixed policy, in a governmental function so indispensable as the collection of revenue. The authorities show that the state can select its subjects of taxation, and select its mode of enforcement and collection. It can distraint personal property and sell it. It can sell realty. Why may it not impose forfeiture, if it deem that a necessary means of getting its revenue? This was "due process of law" of Virginia in this matter of taxation, and complies with the demand of the fourteenth amendment. A drastic remedy it is, and yet can you say that it is not warranted by that immense power of taxation? Coke's old definition of "law of the land" says that it is that which is according to the "old law of the land." 2 Inst., 50. "Tax laws are laws of the land, and tax proceedings conducted

under equal and uniform laws are due process of law." *Burdwell v. Collins*, (Minn.), 20 Am. St. Rep., 554, note (s. c. 46 N. W., 315). "Proceedings by which taxes have been assessed, levied, and collected have always been regarded as administrative, not judicial, and to constitute due process of law, within the meaning of the constitution. Such proceedings have been, from necessity, exercised by governments, during all times, by summary methods of procedure. These methods were in exercise and existence long before the adoption of the constitution, and have never been supposed to be affected thereby." Ruger, C. J., in *McMahon v. Palmer*, 102 N. Y., 176, (6 N. E., 400). When that case went to the United States Supreme Court, the opinion said (what is apt in this case): "That law had been in existence over 40 years at the time of this proceeding. We do not regard the collection in this way, founded on necessity, and so long recognized by the state of New York as to be justifiably resorted to under the circumstances detailed in the act, and operating on all persons and property similarly situated, as within the inhibition of the fourteenth amendment." *Palmer v. McMahon*, 133 U. S., 660, (10 Sup. Ct., 324). A tax act is "law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it provides in order to give the rule full operation. The mode of levying is completely and exclusively within the legislative power." Cooley, Tax'n, 39. The author there shows that the constitution does not restrict this power under the due process clause. *Kelley v. Pittsburgh*, 104 U. S., 78. The landlord under his distress, the sheriff under his tax bill, seize and sell personalty without judicial process, and the sheriff sells lands for taxes without it. Why, since the amendment, is this not unconstitutional? Because those procedures have been settled procedures under the law of the land, and are due process of law in those particular matters. So is the remedy of forfeiture adopted by the state to collect its land tax. Is such procedure necessary? That is for the state to say. But forfeiture divests the owner of title. So does the distress for rent or taxes divest the owner of personal property. It is only another mode of divestiture. It is

claimed that there must be a judicial inquiry to find the fact working forfeiture and declaring the forfeiture. This is so in judicial proceedings, but not in administrative, summary proceedings. This cannot be demanded, unless you say that it is demanded by this particular mode of enforcing taxes,—forfeiture,—and not to sales or other modes; for it is undeniable that no law demands it in proceedings to collect taxes. Mr. Justice Harlan sustains this position in *King v. Mullins*, 18 Sup. Ct. 925, and cites *Murray v. Improvement Co.*, 18 How., 272, in which was considered the case where a distress warrant was issued, under an act of congress, by the solicitor of the treasury against a defaulting collector of customs, and the question was whether it was due process of law; and the court said: "Tested by the common law and statutes of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment [fifth], the proceeding authorized by the act of 1820 cannot be denied to be due process of law when applied to the ascertainment and recovery of balances due the government from a collector of customs, unless there exists in the constitution some other provision which restrains congress from authorizing such proceeding; for, though due process of law generally implies and includes actor, *reus*, *ju. lex*, regular allegations, opportunities and a trial according to some settled course of judicial proceeding [citing cases], yet this is not universally true. There may be, and we have seen there are, cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the bodies, lands and goods of certain public debtors without any such trial. The power to collect revenue, and make all laws necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting that revenue, unless some such means be forbidden in some other part of the constitution. It may be added that probably there are few governments which do or can permit their claims for public taxes on the citizen or officer for their collection or disbursement to become subjects of judicial controversy according to the course of the law of the land.

Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to." Justice Harlan cites *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S., 232, (10 Sup. Ct., 533), holding that: "Process of taxation does not require the same kind of notice as in a suit at law, or proceedings to take property under the power of eminent domain. It involves no violation of due process of law, when executed according to customary forms and established usage." And Justice Harlan added: "This must be so, else the existence of government might be put in peril by delays attendant upon formal judicial proceedings for collection of taxes."

So great is this taxing power, that in *Com. v. Byrne*, 20 Grati., 165, a man was arrested and imprisoned under a mere license certificate issued by a commissioner of the revenue, on failure to pay the license tax as a distiller. He was held to be lawfully imprisoned, and it was said that his imprisonment did not violate the requirement of due process of law. Judge Moncure sustained it in an able opinion. The case of *Wulzen v. Board*, 101 Cal., 15, (35 Pac., 353), aptly expresses the idea I would express as to the effect of legislation of Virginia through so many years in the matter of land taxation. That case says: "Taxes are not, as a general rule collected by judicial proceedings; and the procedure resorted to for their imposition and collection may properly be regarded as due process of law, if it conforms to customary usages." The great opinion of Justice Curtis in *Murray v. Improvement Co.*, 18 How., 279, strongly sustains this view: "This legislative construction of the constitution, commencing so early, when the first occasion for this manner of proceeding arose, continued through its existence, and, repeatedly acted on by the judiciary and executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was due process of law." In *Davidson v. New Orleans*, 96 U. S., 97, it is held: "This court has heretofore decided that due process of law does not in all cases require a resort to a court of justice to assert the

rights of the public against the individual, or to impose burdens on his property for the public use. *Murray v. Improvement Co.*, 18 How., 272, and *McMillen v. Anderson*, 95 U. S., 37." See *Kentucky Railroad Tax Cases*, 115 U. S., 321, (6 Sup. Ct., 57) If there is anything settled by the United States Supreme Court, it is that the requirement of due process of law does not always require judicial procedure. Justice Miller said in *Davidson v. New Orleans*, that the fifth amendment, 'restraining the exercise of power under federal authority without due process of law, though nearly a century old, had scarcely ever been invoked, whereas the fourteenth amendment, adopted in 1866, had filled the docket of the supreme court with cases asking the court to overthrow judgments and legislation of states; that there is abundance of evidence that there exists "a strange misconception of the scope of this provision as found in the fourteenth amendment;" and that it seems every unsuccessful litigant in a state court has made it the means of bringing his abstract opinions of the justice of state decisions and the merits of state legislation before the supreme court. He ridiculed such a construction of the amendment. So have other justices of that court. What is this amendment? Except as a limitation upon state action, it is not new, as respects the demand of "due process of law." That is simply a new application. It only demands of the states what Magna Charta demanded from the time our English ancestors set foot on American soil, and was in the constitution of all the states. For the first time that amendment gave the national government a veto power upon state action upon the citizen not consonant with due process of law, but it gave no new definition of the term "due process of law," or its equivalent, "law of the land." Before it, the state had final right to say whether the act was due process; after it, the supreme court has. That is all. The definition is the same. *Eames v. Savage*, 52 Am. Rep., 757. The amendment does not say what due process is. If it had long been established as such in the state, it is due process under the amendment. *Slaughter-House Cases*, 16 Wall., 78. Legislation, action, and procedure long used by the state as usual or customary in the given case were not at once

swept away because not attended with judicial inquiry. Nor does this amendment cramp the states so as to forbid the adoption of new legislation, action, or procedure which they may deem necessary, wise, and politic in the administration of government. In either case, so it do not assail the essential right of the citizen under the principles of common, equal justice, it is valid under this amendment. *Hurtado v. California*, 110 U. S., 537, (4 Sup. Ct. 111, 292), where a new constitution dispensed with an indictment for murder, and allowed its trial on information. The opinion says: "However exceptional it [proceeding] may be, as tested by definitions and principles of ordinary procedure, nevertheless this, in substance, has been immemorially the usual law of the land, and therefore is due process of law." This constitutional law, state and federal, I repeat, is old, and its definition the same at all times; and yet legislation and procedure under state authority, and federal, too, levying taxes, seizing and selling personal and real estate for taxes, personal for rent, seizing and confiscating personalty under the police power, and even selling a defaulting customs receiver's property under a warrant issued by an executive officer for a debt arising from his collection of tariff, and imprisonment under a mere license tax bill, have not been discovered to be without due process. The fourteenth amendment is highly salutary as a part of the federal constitution, properly construed and applied, as it has been thus far by that eminent tribunal, the Supreme Court of the United States; but it cannot be given the scope often claimed for it, practically denying to the states powers highly essential in the administration of the government. This construction has been several times repudiated by the supreme court.

How has this question of forfeiture for taxes been regarded by the Virginia courts? They have been unable to discover that it is not due process of law. It is true that in *Kinney v. Beverley*, 2 Hen. & M., 318, where the act of 1790 which provided that lands on which taxes should not be paid for three years "shall be lost, forfeited and vested in the commonwealth," Judge Tucker did express the opinion that, without office found, the state could not take title, as it was only by record the king could take

title, not definitely saying the act was invalid. Judge Roane (than whom no one has a higher name among Virginia jurists) said, "I cannot for a moment doubt the power of the legislature to pass the law in question;" and he said that no inquest of office was necessary, and that such a construction would defeat collection of revenue. Judge Green's opinion does not mention the subject. So this case cannot be quoted (as it is sometimes) as against the validity of forfeiture acts, as it was decided on other points. In *Wild v. Serpell*, 10 Grat., 405, it was held that "the statutes of Virginia forfeiting land to the commonwealth for the failure of the owners to enter them upon the commissioner's books and pay taxes are constitutional," and that title vested under them in the state without judgment, decree, or inquest of office. Several cases uphold the statute. *Staats v. Board*, 10 Grat., 400; *Levasser v. Washburn*, 11 Grat., 572; *Smith v. Chapman*, 10 Grat., 445; *Hale v. Branscum*, *Id.*, 418; *Usher v. Pride*, 15 Grat., 190. These cases are unsatisfactory in not discussing the matter, but they do decide it, though in but one was it expressly mentioned. In *Armstrong v. Morrill*, 14 Wall., 120. the constitutional point was not discussed, but the Virginia forfeiture acts were recognized as operative. So it was settled in Virginia. In West Virginia, our courts, in many decisions, have recognized the Virginia decisions as binding authority. *Twigg v. Chevallie*, 4 W. Va., 463; *Smith v. Tharp*, 17 W. Va., 221. And this State adopted this forfeiture policy as her only weapon, as shown by long experience, to compel payment of taxes on vast areas of wild, unseated land, by an act in 1869, and in 1872 by the Constitution containing the forfeiture clause in question, and by several later acts to enforce it. Several decisions recognize the validity of these laws, not by express decisions on the constitutional point, as our courts and bar treated the Virginia cases, and our cases in 4 and 17 W. Va., as settling it under the doctrine of *stare decisis*, but by recognizing these laws as binding law. *McClure v. Maitland*, 24 W. Va., 561; *Auvil v. Jaeger*, *Id.*, 583; *McClure v. Mauperture*, 29 W. Va., 633, (2 S. E., 761); *Tebbets v. City of Charleston*, 33 W. Va., 705, (11 S. E. 23); *Hays v. Camden*, 38 W. Va., 109, (18 S. E., 461); *Wiant v. Hays*, 38 W. Va.,

68, (18 S. E. 807); *Coal Co. v. Howell*, 36 W. Va., 489, (15 S. E. 214). Judge Goff, in the United States circuit court for West Virginia, held this clause of our Constitution valid in *King v. Mullins*. Titles to thousands upon thousands of acres, the homes of our people, rest upon this long line of enactment and decision; and for this Court to reverse so many cases, and annul the constitutional provision, would shake those titles, and turn thousands from their homes. The rule of *stare decisis*, binds us to adhere to them, especially as titles to property rest on those decisions. Not to do so would spread disaster, the extent of which would be appalling. And this is a consideration justly and deeply entering into the question, as the United States Supreme Court said, speaking through Justice Harlan, in *King v. Mullins*, decided in 1898. That court unanimously affirmed Judge Goff's decision holding valid the clause of the constitution in question. I shall not say that the opinion holds that that clause, taken alone, valid, though it virtually does so. The opinion holds that as, in connection with the state constitution, the statutes to sell land as forfeited give the owner a hearing, "there is no ground for him to complain that his property has been taken without due process." In *Reud v. Dingess*, 8 C. C. A., 389, (60 Fed., 21), it was held by the circuit court of appeals (Fourth circuit) that the clause of the West Virginia Constitution was not against the fourteenth amendment. Judge Goff holds the same in *Van Gunden v. Iron Co.*, 3 C. C. A., 229, (52 Fed., 851). Another element in this question is not to be overlooked. The State Constitution (section 4, Art. XIII) provides for a sale of the forfeited land, and, by section 5, gives the owner the excess of its proceeds after paying taxes. This relieves the forfeiture clause from the charge of being arbitrary spoliation and confiscation of property; gives to it the hue of being only a step necessary to collect the taxes, showing that after that the state regards his right by holding in trust for him. I therefore reach the conclusion that this forfeiture clause is not repugnant to the fourteenth amendment.

A point that is pressed against the State Constitution is that it, *ipso facto*, divests the owner of his title, and vests it in the State without judicial inquiry,—without what is

called "office found" at common law. If this is so, it is within the power of the State, under the tax power, to do so. "A legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or assuming the forfeited grant is subject to the legislative authority of the government. It may be after a judicial investigation, or by taking possession directly under the authority of the government, without these preliminary proceedings." *U. S. v. Repentigny*, 5 Wall., 267, 268. Can it, indeed, be said that the owner has irretrievably lost his land, without a hearing to contest the forfeiture? It is beyond doubt that the state has power to forfeit land, and vest title in itself, for delinquency or nonentry for taxes, if it leave a door open for hearing. If the Constitution had declared a forfeiture, and expressly given a hearing, no question could arise. It has declared a forfeiture, and has not shut the door against the owner to contest it. It simply declares that, if a fact exist, forfeiture ensues, as a legal consequence. It only says that a certain offense shall involve a certain penalty. All criminal or penal laws do this, but final conviction and penalty are to come after trial. It seems to me, we cannot consider the clause invalid, when privilege of contestation is not denied. Under the law before the act of 1882, a decree in a proceeding to sell land as forfeited was, while conclusive upon strangers, only *prima facie* evidence of forfeiture as against the owner. *Coal Co. v. Howell*, 36 W. Va., 489, (15 S. E. 214); *Strader v. Goff*, 1 W. Va., 257. In fact *Twiggs v. Chevallie*, 4 W. Va., 463, holds the jurisdiction as limited and special, and based only on forfeiture; and, if the land was not in fact forfeited, the decree would be void. It is perhaps immaterial whether *prima facie* or not, it surely not being conclusive. So, when the owner's title is in any way assailed, he can deny the forfeiture. It may be questioned whether the party claiming under the forfeiture must not show it as an original proposition, as the owner was no party. The forfeiting provision does not give the State or a third party taking title possession, but merely vests title, if forfeited. When sued by them, he can contest the forfeiture. If the State could, she has not enacted that he shall be ousted by

force; and therefore, if she or her purchaser desire possession, they must sue, and he can defend, or he can sue the State's tenant or purchaser in possession. This seems, from authority, adequate hearing, if any were required. How is the party prejudiced? Where the door was open to a taxpayer to enjoin, though a bond were necessary, it did not render an act giving a right to levy a tax not due process. *McMillen v. Anderson*, 95 U. S., 37. Justice Miller said that as he could sue to recover back the money, as an illegal tax, that would free it from the charge of being without due process. In *Railway Co. v. Hunt*, 50 N. J. Law, 308, (12 Atl., 697), there were statutes providing for the destruction of diseased horses; and the court held that these acts are within the police power of the state, and further: "They are not within the prohibition of the fourteenth amendment to the federal constitution, because, although they authorize the abatement of such nuisances in advance of a judicial adjudication of the fact of nuisance, yet they do not make the determination of the officials as to that fact conclusive, and only permit their acts in abating the nuisance to be justified by proof of the actual existence of such nuisance. Plaintiff, however, contends that the determination of the officials that the prescribed disease exists is to be made without notice to the property owners, and without affording them an opportunity to be heard, and on this ground claims that these acts are obnoxious to the constitutional provision invoked. If the legislature by these acts has made the determination of these officials as to the existence of the common nuisance a conclusive adjudication upon the rights of the property owner, then it is perfectly obvious that this legislation cannot be supported. It has been settled in this State that it is not within the power of the legislature to impart to a determination of this sort a conclusive character, as against the property owner, and legislation intending that result was held to be futile. *Hutton v. City of Camden*, 39 N. J. Law, 122. An examination of the acts in question clearly shows that there was no intent in the legislative mind to make the conclusions of the officials decisive of the right of the property owner as to the existence of that condition of things which these acts declared would constitute in

these cases a common nuisance and would justify its abatement by the destruction of the animals diseased. The right of the property owner is not thereby barred, on the one hand, nor is the justification of the officials made effective, on the other hand, by reason of their adjudication, but by reason of the fact that the common nuisance declared by the acts existed, and so existed, as to permit the officials to exercise the power of abatement. What the acts authorize is the abatement of an actual nuisance. They afford no protection to any invasion of the right of property in any other case." The court say in conclusion: "But if the property owner is not deprived of a rights to contest the existence of such conditions, and to obtain redress, as for a trespass, if they are not shown to have existed, such legislative acts would not infringe any constitutional provision." So, in *Lawton v. Steele*, 152 U. S., 142, (14 Sup. Ct., 499), where a statute authorized officers to destroy nets used in violation of the statute, without any judicial proceedings to ascertain the fact of such violation, the court say: "Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain. If not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute." In *Read v. Dingess*, 60 Fed. 27, (8 C. C. A., 395), the court said: "But if the act, in every case of its commission, involves the forfeiture, nothing remains but to ascertain the facts of its commission, and that can as well be done in a subsequent suit involving the title as by a proceeding brought by the state to enforce the forfeiture." Also, *Health Dept. of City of New York, v. Rector, etc., of Trinity Church*, 145 N. Y., 32, (39 N. E., 833), and *People v. City of Yonkers*, 140 N. Y., 23, (35 N. E., 320); *Branson v. Gee* (Or.) Pac., 527. Statutes of limitation take land from one man and vest it in another. Why does no one claim that they violate the Constitution? I suppose because they allow him a hearing afterwards. And the acts of 1872-73 providing for selling the land, gave him right to redeem his land, and so to pay

what he justly owed the State. But since the act of 1882, and especially under that of 1893, for the sale of forfeited land, the proceeding is a regular chancery suit,—must be such,—and the owner must be a party, and is entitled to make full defense against the forfeiture; and surely this is a full hearing before decree, and satisfies the demand for “due process of law.” Under the latter statute (chapter 24, Acts 1893) this proceeding was had. It was held by the United States Supreme Court in *King v. Mullins*, (1898) that, taking the clause of the Constitution and statute of 1882 in connection, the demand of the fourteenth amendment was satisfied, and the proceeding valid. That is our adequate defense for this decision. I am myself now free from doubt as to the correctness of our holding on this question. 153 U. S., 380.

It is claimed that the State is prevented by laches from assailing the tax deed under the tax sale to Cresap in 1871, twenty-two years having passed from the tax deed to the date of this suit. No possession was ever held under the tax deed. The express statute of limitation did not, therefore, bar the State, and laches does not. Where the adverse claimant of land has no actual possession, the other claimant need not sue. Until then it is mere cloud, never maturing as title. *Battin v. Woods*, 27 W. Va., 58. Delay in bringing suit to annul a tax deed is not imputable as laches to the owner. *U. S. v. Insley*, 130 U. S., 263, (9 Sup. Ct., 485); *Cook v. Lasher*, 42 U. S. App., 42, (19 C. C. A., 654, and 73 Fed., 701); *Sommers v. Ward*, 41 W. Va., 80, (23 S. E., 520). The statute of limitations does not, at common law apply to the State. *Hall v. Webb*, 21 W. Va., 322. Our statute now applies limitations to the State, like individuals. Code 1891, c. 35, s. 20. But no statute applies laches to the state, and the common-law rule says that it does not apply to it. 12 Am. & Eng. Enc. Law, (1st Ed.) 56.

It is further raised, as a question, that as the State sold to Cresap for taxes, and collected taxes for years from those claiming under that title, it is estopped by this conduct from claiming forfeiture for nonentry in Sponaugle's name in after years,—the very years which the owners under the tax sale were paying taxes for. Now, as the State at

a tax sale sells, not her own land, but only such title as the taxed party has, and by her sale and deed makes no warranty whatever, this estoppel cannot be maintained. And the forfeiture alleged accrued several years after this sale. *Camden v. Alkire*, 24 W. Va., 681. An estoppel *in pais* against the state from asserting a title to escheated land is not made out by assessment of taxes, and sale and conveyance for taxes, and the assessment and collection of taxes from the purchaser at the tax sale. An auditor's deed made in consummation of a sale for taxes cannot bar the assertion by the State of any claim or right to the land. The court says the deed is without warranty, and has not, as an estoppel, the force which a quitclaim deed has to pass title in the grantor at its date. *Read v. State*, 74 Ind., 252, 260. If it is contended that payment by the tax purchasers of taxes under their title paid the taxes on the land, so that it may be said to the State, "You have already gotten tax once on the land, and you cannot enforce a forfeiture for taxes for the same years in the name of the original owner, whose title we got by the tax sale, we having acquired the land under his title," the response is: "That is so if your tax deed is valid, because there was no title left in the original owner to be taxed, but not so if your tax title is void. If valid, you defeat forfeiture by superiority of your tax title, not by estoppel from conduct, as it does not bind the State in this matter; but, if void, the title was left in the old owner, to be forfeited for taxes, and the State is not bound merely by conduct." And, as to double taxation, *Simpson v. Edmiston*, 23 W. Va., 680, holds that there is no privity between former owner and tax purchaser, their claims being hostile, and payment by the tax purchaser does not discharge the state demand for taxes against the former owner, if lawful demand she had against his title as yet good; and, if he wants to deny the validity of the tax sale and keep his title good, he must still keep the land on in his name, just as in case of two stranger titles.

I come, in conclusion, to a very important question: Is the tax sale to Cresap efficient to pass title? It is alleged to be void because of irregularity in the sale lists apparent. If void, leaving title in Sponaugle, the State acquired

title by forfeiture; but, if valid, it divested Sponaugle of title, leaving no land in him to be entered for taxes, and the State had no longer claims to taxes from him. We have concluded that this sale is valid.

One ground of irregularity is that in the column of the list of sales in which the estate (whether in fee or life) of the owner is to be stated there is a blank as to this tract, and so the estate is not given. Code 1868, c. 31, s. 25, it will be seen, makes sedulous efforts to cure numerous specific irregularities, so as to confer upon purchasers, effectually, such title as the party charged with taxes owned, and also inserts the general provision that the purchaser shall take such title "notwithstanding any irregularity in the proceedings under which the grantee claims title, unless such irregularity appear on the face of the proceedings of record in the office of the recorder, and be such as materially to prejudice the rights of the owner." First, I must say that there would be a presumption of a fee. A deed, under our statute, confers a fee, unless a less estate is stated; and even in a tax-sale list it would be a fair presumption. But who would be misled by it? And, so the owner be not misled, it is no matter as to others. How could he be misled? He would surely know his own estate without information from this list. How does this unsubstantial slip prejudice him? And the same section says: "And no irregularity in the manner of laying off the real estate so sold, or in the plat, description or report of the surveyor or other person, shall, after the deed is made, invalidate the sale or deed." This is a strong curative provision. The sale list is a "report" under it, and the "estate" pertains to the "description." I know the books tell us that, in times past, tax sales were looked upon as forfeitures, and the proceedings must be rigidly regular; but these doctrines do not apply in full force in West Virginia, and ought not to, because our tax-sale system is, and long has been, so large and important to the State in collecting delinquent revenue, and to many buying at her sales, and so important, too, in quieting title and settling the waste places, that the Legislature has, time and time again, in many acts, beginning as far back as 1814, sought to mitigate and qualify, if

not abolish, the strict rule before prevailing, by which almost any irregularity would annul a tax sale, and provided that only substantial errors, capable of working harm to the former owner, and misleading him, and thus prevent timely redemption, should avoid such sale. Each one of these acts has gone further than its predecessor in this effort of liberalization. I referred to this legislation in *Winning v. Eakin*, 44 W. Va., 19, (28 S. E. 757), as did JUDGE HOLT in *Hays v. Heatherly*, 36 W. Va., 613, (15 S. E. 223). Under this rigid procedure, tax sales were a myth, conferring on the purchaser a certain lawsuit, and as certain defeat; and the State had to buy in, herself, vast quantities of land, which lay in her hands many years, wild and unsettled, paying no taxes, and she lost her revenue. Even to-day, with all this legislation, everybody regards tax titles as dangerous shadows. The State offers the land. The purchaser pays the taxes, and gets nothing. The innocent purchaser is disregarded, and the delinquent landowner is favored. True, it seems hard that he should lose his estate for a pittance, but whose fault is it? Is it the fault of the innocent purchaser? This state of things is not the fault of the Legislature. It has seen the bigness of the evil, and often tried to remedy it. Any one looking at its acts must see that it seeks to favor the innocent purchaser, to the extent of saving him from unsubstantial errors by ministerial officers, and technical defects not injuring the owner. The courts should be alert to execute a plain purpose of the lawmakers, and not to nullify it. And especially it is more difficult, after the sale has been executed by a deed, to annul the sale. The Code itself so intends, as above seen. *Winning v. Eakin*, *supra*. I am aware that in *Jones v. Dils*, 18 W. Va., 764, the opinion is expressed that the defect in question vitiates a sale; but the syllabus does not announce this as law. And in *Barton v. Gilchrist*, 19 W. Va., 230, the same opinion is expressed though it may be called obiter, and is not in the syllabus.

Another irregularity is, as alleged, that the sale list does not show in whose name the land was charged for three out of four years for which it was sold. It shows as to one year confessedly, and a sale for that year's taxes

would be as efficacious as four. It would call the owner to redeem. But, looking beyond the printed to the manuscript record, we find it plain that it was sold for four years.

Another defect alleged is that in the affidavit to the sale list the sheriff swears that the list contains a true account of all the real estates sold by "me during the present year for nonpayment of taxes due thereon for the years 1863, 1864, 1865, 1866, 1867, 1868, 1869, and 1870 (or some of those years)." The words in parenthesis are claimed to overthrow the whole sale proceeding of Randolph County. This affidavit is intended, perhaps, more to enforce a true account to the treasury than for the benefit of the land owner. By the unnecessary use of the words of surplusage, the sheriff meant to say some tracts were sold for some years, some for others, but the years named covered the years for which this land was sold. Now, it is the list that tells for what particular years the owner's land is sold, and Sronauble had but to look at it; and that told him his land was sold for 1865, 1866, 1867, and 1868. He should look at the list for this specification, rather than the affidavit. But read both together. The affidavit does not say or intimate that the land was sold for any other than those four years. The years it specified include all the years for which any tract was sold, and the list tells for what particular years a particular tract was sold.

Twenty-two years after the tax deed to Cresap, it is attacked. During all this long period Cresap and his alienees have paid taxes. This, as said above, would not help them, if their tax title were bad; but it is a satisfaction to a court, in rendering judgment, to feel sure that substantial justice is done. The present owners, on the faith of this title, spent a large sum in acquiring the land. The former owners failed to pay taxes charged, let the land be sold, failed to redeem, and afterwards failed to charge their land. They have always been in default, likely because the land was of little value; but now that this land is in reach of the West Virginia Central Railroad, which has pierced that mountain wilderness, and given it life and enterprise, and made land very valuable, and the lumber company is carrying on large operations in cutting timber

on its land very near the line of this tract, the Sponaule claimants come in to redeem. The suit is in the name of the State, it is true; but the contest is between them and the company, as the State has only a tax claim, and the Sponaule representatives applied to redeem, and filed a cross bill to assail the tax title, and thus it is their suit. On which side is the equity, if we go by it? But the law decided it for the Condon-Lane Boom & Lumber Company. Therefore we reverse the decree, and dismiss the State's bill and the Cunningham cross bill.

Reversed.

CHARLESTON.

WETHERED v. ELLIOTT *et al.*

(BRANNON, PRESIDENT, and MCWHORTER, JUDGE, *dissenting.*)

Submitted June 18, 1898—Decided November 30, 1898.

1. APPEAL --*Bill of Review—Error.*

An error of the court in reaching a wrong conclusion as to facts upon the evidence is not correctible by bill of review, but by appeal. (p. 444).

2. LACHES *Newly Discovered Evidence—Bill of Review.*

If a party allege the finding of a document since the decree which would have been relevant evidence for him on the hearing.

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59	242

and knew of its existence and contents, though he made diligent search for it before the decree without finding it, yet, if he could have proven its existence and contents by the evidence of witnesses, he should have done so, and cannot on that ground sustain a bill of review. (p. 443).

3. BILL OF REVIEW—*Newly Discovered Evidence.*

A bill of review for newly-discovered evidence will not lie where the evidence is simply confirmatory or cumulative. It must be decisive in its character,—such as ought, if true, upon rehearing to produce a different decree, and of which the party was ignorant at the time of the decree, and could not have learned by the exercise of reasonable diligence (p. 444).

4. BILL OF REVIEW—*Newly Discovered Evidence—Appeal—Statute of Limitations.*

When a bill of review is predicated on the sole ground of after-discovered evidence, and during the pendency of said bill of review more than two years elapse after the date of the decree sought to be reviewed, and said bill of review is then dismissed, an appeal from the decree sought to be reviewed will be barred. (p. 445).

Appeal from Circuit Court, Braxton County.

Bill by P. B. Wethered against C. D. Elliott and others. Decree for plaintiff. Defendant Elliott filed bill of review, which was dismissed. From the decrees he appeals.

Affirmed.

W. E. HAYMOND, for appellant.

HENRY M. RUSSELL and W. E. R. BYRNE, for appellees C. B. Hart and J. N. Vance. DULIN & HALL, for other appellees.

ENGLISH, JUDGE:

This suit in equity was instituted in the circuit court of Webster County by P. B. Wethered against C. D. Elliott and others on the 27th of April 1893, for the purpose of setting aside and annulling a certain deed which purported to have been executed by said P. B. Wethered and Jonathan Bennett to C. D. Elliott on February 20, 1891, on the ground that said Elliott, acting for and on behalf of C. B. Hart, in his own right and as trustee, and J. N. Vance, on behalf of himself and said Hart and Vance, induced the plaintiff and said Jonathan Bennett to drink intoxicating liquors.

icating liquors to such an extent that they become grossly intoxicated, *non compos mentis*, and totally incapacitated for the transaction of business, and, while so incapacitated, caused and procured the plaintiff and said Bennett to acknowledge a writing on that day purporting to be a deed conveying certain lands therein described to said C. D. Elliott for the purported consideration of five thousand two hundred and forty dollars, by said writing acknowledged to be in hand paid. This land at the date of said writing was very valuable as coal and timber land, and was located within one mile of the West Virginia & Pittsburgh Railroad, and well adapted to agricultural purposes, and well worth fifteen dollars to twenty dollars per acre, and the consideration named in said deed was grossly inadequate, to such an extent as to shock the conscience of a court of equity. Plaintiff also alleged that although said deed recited a consideration of five thousand two hundred and forty dollars, and acknowledged the payment, in fact not one cent of the purchase money so recited as paid was ever paid to him; that as soon as he recovered from his intoxication, and learned that he and said Bennett had executed said writing, he notified Elliott that he repudiated said deed and the sale therein represented, and that, unless the land was reconveyed to him, he would bring suit to set aside said pretended deed and sale; and he prayed that said writing purporting to be a deed from himself and said Bennett, dated February 20, 1891, might be set aside, canceled, and annulled, and for general relief.

On the 24th of November, 1893, said chancery cause was transmitted from the circuit court of Webster County to the circuit court of Braxton County; and on November 29, 1893, the judge of said court being so situated that he could not properly preside at the hearing of said cause, W. W. Brannon was elected special judge to try the same. On the 4th of December, 1893, C. D. Elliott filed his separate answer, and C. B. Hart and J. N. Vance filed their joint and several answer to plaintiff's bill, and the plaintiff replied generally thereto. Depositions were taken in the cause, and on December 18, 1894, a decree was rendered in favor of the plaintiff holding that the defendants Hart, trustee, and Vance were not entitled to hold said

land under the deed made to C. B. Hart, trustee, by the defendant C. D. Elliott on the 14th of March, 1891, but that said Hart, trustee, and Vance were entitled to charge said land with the amount paid by them for the land conveyed by the last-mentioned deed before notice of the plaintiff's rights, after first abating the relative value of the two tracts of one hundred and six and sixty-six acres conveyed by said deed upon the basis of seven dollars per acre for the whole of the land conveyed by said deed, and also the relative value upon the same basis of the tract of one hundred acres conveyed by Jonathan Bennett to C. D. Elliott, bearing date February 20, 1891. But such charge in their favor was made subject to the right of the defendant John D. Alderson, commissioner, to enforce his lien for purchase money upon one undivided third of said one thousand three hundred and ten acres. It was further held that said deed from Bennett and the plaintiff to said Elliott, and the deed from said Elliott to defendant Hart, trustee, so far as the same conveys the said tract of one thousand three hundred and ten acres, be canceled and annulled; and the defendant Jonathan Bennett was declared to be a trustee holding the legal title to said one thousand three hundred and ten acres as to two undivided thirds thereof, and the equitable title in the other undivided third for the benefit of the plaintiff, subject, however, to a charge thereon in favor of Jonathan Bennett for the amount which may have been paid by him on plaintiff's behalf on account of taxes against said land, which amount, with any other taxes assessed thereon that might be paid by him, should be payable next after the sum to be charged in favor of the defendants Hart, trustee, and J. N. Vance; and said Bennett was restrained from making any sale or conveyance of said land until the further order of the court, and an account was directed. On April 29, 1895, said Elliott asked leave to file a bill of review in said cause, accompanied by the original deed from Bennett and Wethered to Elliott mentioned in the cause, and also by several affidavits, basing his application on the ground of newly-discovered evidence; and the plaintiff in said cause, P. B. Wethered, appeared and objected to the filing of said bill of review, and demurred thereto, in which demurrer said

Elliott joined. On consideration whereof it was ordered that said bill of review be filed, and the same was remanded to rules, to be there matured for hearing as to the parties not appearing thereto, and said Wethered had leave to file his answer to said bill of review within thirty days after the adjournment of court; and Wethered was enjoined from the prosecution of said suit, and the execution of the decree to be reviewed, until the final hearing of the matters arising upon said bill of review, upon said Elliott executing bond, with good security, in the penalty of three hundred dollars, to be approved by the clerk. Wethered answered said bill of review. Depositions were taken thereon by plaintiff and defendant, and the cause was matured for hearing; and on May 5, 1897, the cause was again heard upon the bill of review, and the court dismissed said bill, dissolved the injunction, and decreed that Elliott pay the costs of the proceeding. From this and the former decree, Elliott appealed.

The appellant assigned six grounds of error, the last of which claims that the court erred in dismissing the bill of review filed in the case, and was not warranted in dismissing it by the law or the evidence. but, instead, the said bill of review should have been sustained, and said former decree reversed and annulled, and the plaintiff Wethered's bill dismissed with costs. Counsel for the appellee Wethered, on the other hand, in their brief assign as cross error the overruling of the demurrer of Bennett and Wethered to the bill of review. The only special ground assigned in the demurrer was that the bill of review did not point out in what particular the decree asked to be reviewed was claimed to be erroneous; the only allegation being that "said decree of 18th December, 1894, was erroneous because of the evidence not in the cause, which has been discovered," etc. This cross error applies to the action of the court on the 28th of August, 1895, upon the demurrer; and assignment No. 6 of appellant refers to the action of the court on May 5, 1897, when said bill was dismissed on the hearing of the cause. Counsel for the appellee insist that the decree overruling said demurrer was erroneous because the ground of demurrer relied on was not sufficient, and that it should have pointed

out specifically the particulars in which it was claimed the decree was erroneous; citing 3 Enc. Pl. & Prac., 591, where the law is thus stated: "In a bill of review, it is necessary to state the former bill, and the proceedings thereon, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it, and the ground of law or new matter discovered upon which he seeks to impeach it." And in the note it is said, "No errors can be noticed, unless they are specifically pointed out;" citing numerous authorities,—among others, *Amiss v. McGinnis*, 12 W. Va., 371, in which it was held that, "in a bill of review, it is generally necessary to state the former bill substantially, and the proceedings thereon, the decree, and the point by which the party exhibiting the bill conceives himself aggrieved." Counsel for appellee also insist that the bill of review was bad on demurrer because J. D. Alderson, a party to the original suit, was not made a party to the bill of review; citing *Nichols v. Nichols' Heirs*, 8 W. Va., 174, and 1 Bart. Ch. Prac., 205, where the general rule is stated to be that all parties to the original bill should be made parties to the bill of review. It is also urged that said bill of review was bad on demurrer because there was not filed therewith an affidavit that the matter claimed to be new could not have been used in the original cause; citing *Dingess v. Marcum*, 41 W. Va., 757, (24 S. E. 624), and others. An examination of the record shows that the bill of review was sworn to, and several affidavits were filed in support of said bill. The affidavit of C. P. Dorr was filed with said bill. His deposition had been taken in the original cause, and in said affidavit he states that on April 2, 1895, he found among his papers a statement of the settlement made at the time of said land sale, which was filed with his affidavit; but this statement, if material, was found nearly a month before said bill of review was filed, the same being filed on the 29th of April, 1895, and might have been obtained by due diligence on the part of the plaintiff in said bill of review. The other affidavits pertain to conversations had with said Wethered and Bennett before the deed for said land was attempted to be made, and no good reason is shown why the evidence could not have been obtained before the trial of the cause, by using

due diligence; and, if the evidence indicated by these affidavits had been adduced, it must be regarded as cumulative. The reason of the rule requiring the affidavits to state the nature and character of the evidence to be filed, when the ground of the bill of review is newly-discovered evidence, is to enable the court to determine, when the bill is presented, as to whether it should be entertained or not; and, looking at these affidavits, they do not appear to have met this requirement. Neither do I think the allegations of the bill such as would entitle the same to be filed. I conclude, therefore, that this cross assignment of error was well taken.

The bill of review was dismissed at the hearing, and this brings us to the consideration of the sixth assignment of error claimed by appellant, which is quoted above. I do not deem it necessary, in considering this assignment of error, to go into an analysis of the evidence taken in support of said bill of review, but will call attention to the allegations of the bill of review as to the items of new evidence on which the plaintiff therein relies. As to the facts he expected to prove by T. M. Daly, he claims that he had ascertained that he could prove said Daly collected certain drafts given by plaintiff to Bennett, which were involved in the controversy of Wethered against plaintiff, and that he accounted to Bennett therefor, and that he was not aware of what account he had rendered to said Bennett. Plaintiff also alleged that he could then prove by said Daly that he was authorized by Wethered, prior to the date of deed from Bennett and Wethered to him, to make sale of said land to him, and that in pursuance of said authority he did make the sale; but it is shown in Wethered's deposition that this evidence was irrelevant, for the reason that it pertained to a contract between Wethered and Bennett and Daly, authorizing the latter to sell the land in question, which was surrendered and canceled some time before the deed in the bill mentioned was made from Bennett and Wethered to Elliott. The same thing is shown by the deposition of Jonathan Bennett; and the plaintiff Elliott, in his deposition, says that he had Daly summoned as a witness, but was afraid to examine him, although he knew he was in possession of certain facts which he regarded as mate-

rial. As to the original deed, a copy of which was filed in the original cause, and which is claimed as material, as bearing upon the question of the intoxication of the grantors, it must, when examined for that purpose, be regarded, if of any value, as merely cumulative, and for that reason could not be considered in support of the bill of review.

Barton, in his *Chancery Practice* (volume 1, p. 337), in speaking of the character of the evidence which will support a bill of review, says: "The evidence must have been discovered since the decree, must appear to be material to the case, and such as would probably effect a different result; for immaterial or merely cumulative testimony will not suffice to sustain a bill of review, and if a party should be allowed to go on to a decree without looking for evidence which might be obtained by a proper search, and afterwards, upon finding the evidence, to file a bill of review, there would be no end to such bills." As to the evidence of Mollohan which plaintiff claimed to have discovered, it was irrelevant, as it applied to the sale which Wethered was seeking to effect under his contract with Daly, which the evidence shows was canceled before the deed was made by Bennett and Wethered to Elliott. As to the evidence of Reuben Weese, reference to his affidavit shows that the conversations he had with Bennett and Wethered had reference to the contract made with Daly, which had been surrendered and canceled before the date of the execution of the deed in controversy. As to the statement found by Dorr, made at the time of the sale, the drafts, and the Daly contract, if material, the plaintiff knew that said papers existed, and in whose custody they were; and, if he could not find them, he could have proved their existence and contents by the evidence of witnesses. See *Dingess v. Marcum*, 41 W. Va., 757, (24 S. E. 624, Syl. point 2). In *Machine Co. v. Dunbar*, 32 W. Va., 335, (9 S. E. 237), it was held that: "If a party allege the finding of a document since the decree which could have been relevant evidence for him on the hearing, and knew of its existence and contents, though he made diligent search for it before the decree without finding it, yet, if he could have proven its existence and contents

by the evidence of witnesses, he should have done so, and cannot on that ground sustain a bill of review." In the same case (Syl. point 2) it is held that: "A bill of review for newly discovered evidence will not lie where the evidence is simply confirmatory or cumulative. It must be decisive in its character,—such as ought, if true, upon rehearing to produce a different decree, and of which the party was ignorant at the time of the decree, and could not have learned by the exercise of reasonable diligence." Neither of the affidavits filed in support of the bill of review, or the depositions relied on to set aside the former decree, are decisive in their character, or such, if true, as ought to produce a different decree upon rehearing.

The circuit court, in the decree rendered in the original cause, found that the deed bearing date February 20, 1891, executed by Bennett and Wethered to C. D. Elliott for the tract of one thousand three hundred and ten acres of land, was executed at the time when the grantors named therein were both grossly intoxicated, and totally incapacitated for the transaction of business, and that said intoxication was connived at and procured by said Elliott for the purpose of obtaining said deed. This Court has held in *Dunn's Ex'rs v. Renick*, 40 W. Va., 350, (22 S. E. 66 Syl. point 9) that "an error of the court in reaching a wrong conclusion as to facts upon the evidence is not correctible by bill of review, but by appeal." The court in said original suit having decided that no title passed by said deed of February 20, 1891, as we have seen, the conclusion thus reached could not be corrected by bill of review. The bill of review in this case, having been predicated on the sole ground of after-discovered evidence, did not prevent the appellant from prosecuting his appeal in this Court from the decree sought to be reviewed, as the questions presented to the two tribunals by the separate proceedings were entirely distinct, and no confusion could arise from their separate determination. See *Gillespie v. Allen*, 37 W. Va., 675, (17 S. E. 184). The pendency of this bill of review, therefore, did not prevent the running of the statute of limitations; and therefore on the 5th day of May, 1897, when said bill of review was dismissed, an appeal from said former decree was barred. Therefore

my conclusion is that it is unnecessary to discuss the other assignments of error, and that the court committed no error in dismissing said bill of review, or dissolving the injunction awarded the plaintiff. The decree complained of is therefore affirmed, with costs and damages.

BRANNON, PRESIDENT, (*dissenting*):

Nichols v. Nichols' Heirs, 8 W. Va., 174, lays down: "Although ordinarily a bill of review will not lie where the newly-discovered evidence is simply confirmatory or cumulative, still, if the newly-discovered evidence is not merely confirmatory or cumulative, but decisive in its nature and could not be discovered before the final decree sought to be revised, by the exercise of a reasonable diligence, in such a case a bill of review will lie." This was followed in *Machine Co. v. Dunbar*, 32 W. Va., 335, (9 S. E. 237), and *Douglass v. Stephenson's Ex'r*, 75 Va., 756, is upon the same principle. I think that the evidence presented in this case as newly discovered is sufficient to call for a rehearing, under the test laid down in those cases. There is no use to detail that evidence here. I think that evidence, taken in connection with the evidence heard on the hearing of the case, probably, ought to have called for a rehearing. My opinion is that it exculpates Elliott from the grave wrong imputed to him in the case.

Affirmed.

45	446
58	128
58	273

45	446
61	476

CHARLESTON.

45	446
e62	75
f63	565

ABNEY *et al.* v OHIO LUMBER & MINING CO.

Submitted June 18, 1898—Decided December 3, 1898.

1. PROCESS—*Issuance of Process.*

Process to commence a suit or action is issued by the clerk on the order of the plaintiff or his attorney or agent, and not by order of the court. (p. 453).

2. ATTACHMENTS—*Clerk's Office—Process.*

Whether the court is in session or vacation, the clerk's office is open for the purpose of commencing suits or actions by issuing process therefor, including also process of attachment under chapter 106 of the Code. (p. 453).

3. CORPORATIONS—*Deed—Acknowledgment—Recordation.*

A certificate of acknowledgment of a deed conveying real estate by a corporation, which fails to show that the officer or agent executing it was sworn, and deposed to the facts contained in the certificate, as required by section 5, chapter 73, Code, is fatally defective, and does not entitle such deed to be recorded (p. 452).

4. UNRECORDED DEED—*Vendor and Vendee—Creditors—Notice.*

An unrecorded deed is void as to creditors, whether they have notice or not, but it will be good against purchasers with notice, or who have not purchased for valuable consideration. (p. 452).

Error to Circuit Court, Wayne County.

Action by Abney, Barnes & Co. against the Ohio Lumber & Mining Company. Attachment awarded, and W. H. Millinger and William Nold, assignees of defendant, filed claim. Findings for the claimant, and from an order refusing to set same aside plaintiffs bring error.

Reversed.

PAYNE & PAYNE, for plaintiffs in error.

HARVEY, WYATT & HUTCHINSON and CAMPBELL, HOLT & CAMPBELL, for defendant in error.

MCWHORTER, JUDGE:

The Ohio Lumber & Mining Company, a foreign and insolvent corporation, on the 23d of January, 1897, executed and delivered to W. H. Millinger and William Nold, assignees, a deed of assignment of all its real estate and personal property, for the benefit of all its creditors, to be paid *pro rata*, with the following certificate of acknowledgment: "The State of Ohio, Columbiana County—ss.: I, James W. Clark, a notary public in and for said county and state, do hereby certify that S. J. Rohrbaugh, president of the Ohio Lumber and Mining Company, and J. L. Yoder, secretary of said company, whose names, respectively, are signed to the foregoing instrument, bearing date on the 23d day of January, 1897, have this day acknowledged before me in my said county the signing and execution of said instrument, for themselves, respectively, and for and on behalf of said the Ohio Lumber and Mining Company, and acknowledged that they affixed the corporate seal of said company to said instrument by direction of a resolution of the directors of said company, and have acknowledged that the same in all respects is their free act and deed, as such officers respectively, and the full act and deed of said corporation for the purposes and uses herein set forth. I further certify that S. J. Rohrbaugh and J. L. Yoder are known to me to be the individuals and officers described in and who executed said instrument. I further certify that William H. Millinger and William Nold, whose names are signed to the foregoing instrument, have this day acknowledged the same before me in my said county. Witness my hand and official seal, this 23d day of January, A. D. 1897. James W. Clark, Notary Public. [Notarial Seal. J. W. Clark, Columbiana County, Ohio.]"

On the 25th day of the same month the said assignment, with the certificate of acknowledgment indorsed thereon, was admitted to record in the clerk's office of the county court of Wayne County. Two days after, on the 27th day

of said January, Abney, Barnes & Co., creditors of said company, instituted their action of *assumpsit* in the circuit court of Wayne County, suing out their writ from the clerk's office of said court returnable at the February rules, 1897, and on the same day filed an affidavit claiming the right to recover nine hundred and thirty-nine dollars and seventy-one cents, and gave bond for attachment, upon which the clerk of said court issued an order of attachment against the estate of said corporation, which was duly levied on both the personal effects and real estate of defendant, the levy on the personal property being made on the 27th of January, and on the real estate on the 29th of January, 1897. On the 2d day of February, 1897, the said deed of assignment was reacknowledged, and on the 4th of February was again recorded, together with the new certificate of acknowledgment. The assignees, W. H. Millinger and William Nold, appeared in court on the 2d day of February, 1897, and tendered their petition in the said action of *assumpsit*, setting up their claim to the property of the defendant corporation by virtue of said deed of assignment, and praying that the claim to the property and its possession be adjudicated and determined according to the statute in such case made and provided, and that said order of attachment be quashed and abated, and that said levy be released, and for general relief; to the filing of which petition plaintiffs objected, and by consent the matters arising on said objection were passed to a future day of the term, and on the 10th day of February the court overruled the objection, and filed the petition, and the parties agreed as to the facts and submitted the matters of law and fact to the court in lieu of a jury. On consideration the court held that the deed of assignment was a valid deed, and that the same was duly and properly recorded on the 25th of January, and that the claim of said assignees to the property attached was paramount and superior to the said attachment, and ordered that the levy of said attachment on all of said property, except the money, if any, in the Huntington National Bank, be released and discharged, and that the officer levying the same deliver all of said property to the said assignees, and rendered judgment for petitioner's costs; to which ruling

of the court in directing the release of the real estate levied on by plaintiffs, and in holding that said deed of assignment was duly recorded on the 25th of January, 1897, and that the title of said assignees to said real estate was paramount to the lien of plaintiffs' attachment, plaintiffs objected and excepted and on motion of plaintiffs the operation of so much of the order and judgment as affected the real estate was suspended for sixty days to give plaintiffs time to obtain a writ of error, and the plaintiffs moved the court to set aside its finding and judgment, and grant them a new trial, of which the court took time until the next term to consider. At the June term, 1897, of said court, the order of publication awarded having been duly published and posted, judgment was rendered for plaintiffs in the action of *assumpsit*, by the court in lieu of a jury for nine hundred and thirty-nine dollars and seventy-one cents, but the court declined to order a sale of the property attached, and reserved all matters pertaining to a sale for further consideration and action. And on the 4th day of December, 1897, the court, having maturely considered the motion of plaintiffs to set aside the finding and judgment rendered upon the petition of the assignees holding that said petitioners were entitled to the possession of the property levied upon by the order of attachment, and grant them a new trial, overruled said motion, and refused to set aside the judgment and grant a new trial, to which rulings plaintiffs excepted. Plaintiffs obtained a writ of error and supersedeas.

It is insisted by appellants that under section 5, chapter 74, Code, the deed of assignment was void as to their creditors by reason of the fact that the certificate of acknowledgment to said deed was so defective under the statute providing for acknowledgments of deeds and other writings by corporations that it could not be admitted to record, and, if not properly recorded, under said section 5, chapter 74, it remained void as to creditors and subsequent purchasers for valuable consideration without notice, notwithstanding it was written in the record book in the clerk's office. Sections 2, 3, chapter 73, Code, provide what instruments of writing shall be recorded, and what is necessary to appear on such writing, or how it

shall be proved to entitle it to recordation; and, if it is wanting in certificate of proper acknowledgment of proof required by the statute, it is not recordable. Section 5, chapter 73, prescribes what shall be evidence of proper acknowledgment of a corporation to entitle the writing acknowledged to be recorded. The officer or agent of the corporation must be first sworn or affirmed by the magistrate taking the acknowledgment, and he must depose and say (1) that he is such officer or agent of the corporation described in the writing bearing date on the——day of ——, 18—; (2) that he is authorized by said corporation to execute and acknowledge deeds and other writings of said corporation; (3) that the seal affixed to said writing is the corporate seal of said corporation; and (4) that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And after this deposition is given the officer or agent acknowledges the said writing to be the act and deed of said corporation, all of which must appear in the certificate of the certifying officer. And this is required by the statute to appear before the paper can be legally admitted to record. It will be seen from the certificate that the officers who executed the deed were not sworn or affirmed, but simply appeared before the notary public, and acknowledged, as set forth in the certificate. The form of acknowledgment on behalf of a corporation is a recent enactment (Acts 1891, p. 38, s. 5), prior to which there was no particular form prescribed, but, if the corporate seal was affixed, and the signature of the proper officer was proved, the courts would presume that the officer did not exceed his authority, and the seal itself was *prima facie* evidence that it was affixed by proper authority, and the contrary must be shown by the objecting party. *Lamb v. Cecil*, 25 W. Va., 288. The legislature enacting the statute requiring this most solemn form of acknowledgment evidently appreciated the importance of it, and intended it as a safeguard to the vast interests committed to the care of the officers of the corporations, and to prevent them from abusing their powers. But it is contended by appellees that "the taking and certifying the acknowledgment of a deed is in the nature of a judicial act, whether done by a court, justice, or a notary,"

and "that such certificate of acknowledgment is conclusive of every fact appearing on the face of the certificate," and cite many authorities to sustain their position, which is, I think, a correct one. This being true, does it cure the defect alleged in the certificate in this case?

The facts shown in the certificate are, that the notary who took the acknowledgment was duly authorized thereto, that S. J. Rohrbaugh, president of the Ohio Lumber & Mining Company, and J. L. Yoder, secretary of said company, whose names were respectively signed to the deed, acknowledged on the day mentioned, before the notary, in his county, the signing and execution of said instrument for themselves, respectively, and for and on behalf of said company, and they also acknowledged that they affixed the corporate seal of said company to said deed by direction or resolution of the directors of said company, and that in all respects the same was their free act and deed as such officers, respectively, and the full act and deed of said corporation for the purposes and uses therein set forth; and the notary further certifies that S. J. Rohrbaugh and J. L. Yoder were known to him to be the individuals and officers described in and who executed said instrument, which last fact appellees insist makes the certificate sufficient to entitle the deed to recordation. The facts as set out and acknowledged by the persons who executed the deed were substantially as required by said section 5, chapter 73, Code, but it fails to show that the acknowledging parties were by the notary duly sworn, and deposed to the truth of the facts acknowledged by them; and the only fact stated, to the truth of which the notary certifies, except merely the fact of acknowledgment, is that the said parties were known to him to be the individuals and officers described in and who executed said instrument. The most important fact under the statute, viz. the fact that the parties were sworn, and deposed to the truth of the fact acknowledged, fails to appear in the certificate. "To render the acknowledgment effectual, it must affirmatively appear from the certificate that the requirements of the statute have been substantially observed." 1 Devl. Deeds, § 508, and cases cited. "Acknowledgment is a prerequisite for registration in a majority of the states, and a nec-

essary incident to every conveyance designed to furnish constructive notice under the recording acts; and when, by reason of defects or omissions, the statutory requirements are not substantially complied with and the instrument is not legally recordable, and, although actually transcribed, the record thereof will not afford constructive notice." 1 Warv. Vend. 519. "To entitle a deed to registration, it must be executed according to the statute requisites by which the registry of deeds is established." *Isham v. Iron Co.*, 19 Vt., 230. The question is not, as seems to be claimed by appellees, whether the deed is good and sufficient, as between the corporation and the assignees or trustees, to convey the property described in the deed, but is the acknowledgment sufficient to entitle it to recordation? In *Cox v. Wayt*, 26 W. Va., 807 (Syl. points 1, 2), it is held: "If a deed of trust, the execution of which has not been proved or acknowledged in the manner prescribed by law, be admitted to record by the clerk of the county court of the proper county, such deed is not 'duly admitted to record.'" (2) "If such a deed so admitted to record be copied by such clerk into the deed book, it is not, by being so copied into such book, 'duly admitted to record.'" The acknowledgment is clearly fatally defective, as shown by the certificate, and it was not properly recorded. It is stated in the agreed facts that a member of the plaintiffs' firm and their attorney read the deed as spread upon the record before suing out their process and attachment. Section 5, chapter 75, Code, provides that a "deed of trust or mortgage conveying real estate or goods and chattels shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract or deed may be." In *Guerrant v. Anderson*, 4 Rand. (Va.) 208 (Syl. point 2), it is held that "an unrecorded deed is void as to creditors, whether they have notice or not; but it will be good against purchasers with notice or who have not purchased for valuable consideration;" and (point 3): "A purchaser under a sale on behalf of a creditor holds the right and occupies the place of the creditor, and therefore he will not be affected by

notice of an unrecorded deed." Appellees contend that the motion to quash the attachment should have been sustained, because there was no suit legally pending; that the writ was void, and a nullity, for the reason that the court whose clerk issued it was in session at the time, and no permission asked of, or leave granted by, the court to bring the suit; that the supposed writ was made returnable to February rules to be held in the clerk's office of said court the following Monday, when it was known the court would be, and in fact was, in session, as shown by the record. Section 5, chapter 124, Code, provides that "the process to commence the suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action. It shall be issued on the order of the plaintiff or his attorney or agent, and shall not, after it is issued, be altered, nor any blank therein filled up, except by the clerk." This is the only provision in the statute for process of the court to commence a suit or action, and it is always issued by the clerk, and issued on the order of the plaintiff or his attorney or agent, and not on the order of the court. So that, whether the court is in session or vacation, the clerk's office is open for the purpose of commencing suits or actions by issuing process therefor, including also process of attachment, under chapter 106, Code. Sections 1, 2, chapter 125, Code, provide for taking rules by the clerk, arranging same as far as possible that the same may not come on a court day of a regular term; the rules are to be entered by the clerk; and section 4 provides that "when there is no clerk to take a rule in a case, it shall stand continued until the next rule day after there is a clerk;" and section 5: "The rules may be to declare, plead, reply, rejoin, or for other proceedings; they shall be given from month to month." It is especially the clerk's duty to enter the rules, and there is no prohibition to his entering them when the court is in session, except as provided in section 1 aforesaid. The last clause of section 2, chapter 124, Code, which reads, "and process awarded in court may be returnable as the court shall direct," has no reference to the original process to commence a suit or action, but process found necessary by the court to a proper disposition of a case, which

has been so far matured as to place it upon the court's docket, and includes *seire facias*, to revive, rules to show cause, etc., as well as process for new parties found to be necessary to a proper hearing of the cause. No exceptions having been taken as to the judgment of the court releasing the lien of attachment on the personal property, I have not deemed it necessary or proper to discuss the sufficiency of the recordation of the deed of assignment as a mortgage or trust on personal property, such trust or mortgage being accompanied with a transfer of the possession of the personal property in good faith for a lawful purpose.

For the reasons herein stated, so much of the judgment of the court as is complained of—that is to say, so much of the finding and judgment as finds that the deed of assignment was properly admitted to record on the 25th day of January, 1897, and that the title of the assignees, Millinger and Nold, to the real estate, was paramount to the lien of plaintiff's attachment—is set aside and annulled, and the case remanded to the circuit court of Wayne County for further proceedings to be had therein.

Reversed.

CHARLESTON.

DAVIS v. BAKER *et al.*

45	455
49	291

Submitted Sep. 10, 1898—Decided Dec. 3, 1898

1. DEPUTY SHERIFF—*Bond—Contracts—Sheriff.*

In an action of debt upon a bond executed by a deputy sheriff to his principal, which bond, on its face, as a part of the condition, recites that said deputy is to act as such during the term of said sheriff's office, which bond is accepted by such sheriff, and such deputy proceeds to perform the duties of his office under said bond, and continues to perform said duties during the entire term of said sheriff's office, said bond must be considered as a contract between said sheriff and his deputy. (p. 458).

2. DEPUTY SHERIFF—*Bond—Compensation—Set-Off.*

Where such action is predicated on a claim that the defendant has failed to comply with the conditions of his bond by paying over and accounting for all money which may come into his hands by virtue of his office, the defendant may prove and have allowed as a set-off against said claim, such amount as he may be entitled to for his service as such deputy, if the same are set forth and described in the bill of particulars filed with his plea. (p. 459).

3. DEPUTY SHERIFF—*Sheriff—Compensation.*

If the sheriff, during his term of office, and after said deputy has served two years, relieves him of a portion of the duties originally assigned to him, against his protest, but does not remove him, and no change is then made as to the original agreement for compensation, the fact that the labors of such deputy are thus diminished will not necessarily reduce his compensation. (p. 458).

4. DEPUTY SHERIFF—*Compensation—Breach of Bond.*

If it appears from the evidence that such deputy, during the four years of his service, performed the portion of the duties of

the office of sheriff of Jefferson County which he contracted to do, for the compensation he was to receive under the original agreement, by retaining his pay for such services out of money collected by him, he committed no breach of the conditions of his bond, as he in this manner, accounted for the money that came into his hands. (p. 459).

5. STATUTE OF FRAUDS—*Deputy Sheriff.*

The statute of frauds does not apply, under the circumstances of this case, to defeat the claim of the defendant for his services. (p. 458).

Error to Circuit Court, Jefferson County.

Action by Albert F. Davis against Eugene Baker and another. From a judgment for plaintiff, defendants bring error.

Reversed.

GEORGE BAYLOR, for plaintiffs in error.

FOREST W. BROWN, for defendant in error.

ENGLISH, JUDGE:

Albert F. Davis brought an action of debt against Eugene Baker and W. A. Morgan in the circuit court of Jefferson County, returnable to April rules, 1896, on a bond executed by said Baker to him as deputy sheriff, with said Morgan as his security. The defendant Baker cravedoyer of the bond, and pleaded conditions performed and conditions not broken, and set-off, and filed with his last-named plea his bill of particulars of set-off, to which pleas the plaintiff replied generally. Defendant pleaded payment, and issue was joined thereon. Defendant also gave notice to plaintiff that on the trial he would offer, in recoupment of plaintiff's claim, evidence sustaining the items contained in said bill of particulars of set-off. A jury was waived, and the case submitted to the court upon the issues joined; and the court, having heard the evidence, found for the plaintiff, and assessed his damages at one thousand five hundred and thirty-one dollars and fifty-eight cents, with interest from June 2, 1897. The defendant moved the court for a new trial, and in arrest of judgment, which motion was overruled. Now, the bond sued on was a private bond, and the gist of the action is the

breach of the condition; in other words, in order that the plaintiff should recover in this case, it was incumbent on him to show that the defendant did not faithfully discharge and perform the duties of said office of deputy sheriff during his continuance therein according to law, and pay over and account for all money which might come into his hands, and make settlements of his actions as such deputy, as was required by law for sheriffs to make, or whenever required to do so by said Davis, and make a final settlement of all his actions within two years from the expiration of said term of said office. The controversy in this case arose from the following facts: The plaintiff, Davis, was sheriff of Jefferson County, and by arrangement and agreement between him and his deputies, the work of the shrievalty of the county was apportioned between them and him in the the same manner as it had been apportioned by the former sheriff. The defendant by this agreement was to perform the work in Charlestown and Middleway, and, as compensation, was to receive one-third of the commission. Under this arrangement the defendant acted as deputy for the plaintiff for two years, performing the duties required of him in said two districts, and receiving the compensation agreed upon. At the end of that time the plaintiff took from defendant the books of Charlestown district, leaving him only the books of Middleway district, against which action on the part of said Davis the defendant protested. Said defendant continued to ride and perform the duties of deputy sheriff in Middleway district until the end of the term.

At the time the books of Charlestown district were taken away from defendant, nothing was said about changing the original contract. This is shown both by the testimony of plaintiff and defendant. When the defendant Baker paid over to plaintiff the money remaining in his hands at the end of the term, he retained his commissions which he claimed to be entitled to under the original agreement, and paid the plaintiff the balance. If the defendant was entitled to do this he committed no breach of his bond. In the case of *Jackson v. Hopkins*, 92 Va., 601, (24 S. E. 234), it was held that, "in an action on a bond with collateral condition, the break of the condition is the gist of the

action, for without the breach there is no cause of action." Was the defendant entitled to retain the pay for his services under the original agreement? No one questions the right of the sheriff to remove his deputies, but that was not done in this case. The plaintiff, in his testimony, says the defendant rode two districts for two years, and then he told him he could take Middleway district; that defendant protested against it, but nothing was said about commission, and not one word about changing the original contract. Defendant continued to act as deputy. The plaintiff only gave him less labor to perform for the last two years. Counsel for the plaintiff claims that the defendant's contract was void, under the statute of frauds, because it was a verbal one, which could not be performed according to the intent of the parties within a year from the time of making. This statute, it seems to me, has no application to this case. Here a bond was sued on, with a collateral condition. It was executed by the defendant, and accepted by the plaintiff. By accepting it, the plaintiff adopted it as his contract. See 2 Am. & Eng. Enc. Law (1st Ed.) p. 460, where the law is thus stated: "It is essential to the validity of a bond that it be accepted by the grantee. There is no delivery without acceptance." It appears on the face of the bond sued on that the defendant Baker was appointed as one of the plaintiff's deputies, to act during his term of office, for four years, and the same is averred in the declaration; and it does not appear that he was ever removed as such deputy by the plaintiff. It was, then, a part of the contract between plaintiff and defendant that defendant was to serve as such deputy for four years, and, while it is true the plaintiff had the power to discharge him, he never exercised that power. Baker, then, acted as such deputy under this contract, his work and the compensation therefor being fixed by verbal agreement. Thus, the duration of the performance of his services was fixed by the bond, and the value of the services and their compensation by verbal agreement. It is shown by the evidence that said Baker for the years 1889-90 collected three-sixths of the county and state levies, or one-sixth each year more than he was required to do under his contract; so that although he was only allowed to collect

one-sixth each year for 1891 and 1892, yet during the entire four years collected at the rate of one-third each year,—that is, performed the work that would entitle him to full pay under his contract, so that on the *quantum meruit* he was entitled to the amount he retained for his services.

A question is raised on the argument as to whether he would be entitled to set off his claim because the same was unliquidated. I cannot think there is anything in this objection, for the reason that the account claimed as a set-off grows out of the same transaction. In the case of *De Forrest v. Oder*, 42 Ill., 500, it was held that unliquidated damages which do not grow out of the contract or cause of action sued upon are not a proper subject of set-off. They must grow out of the transaction upon which the suit is brought. The claim asserted in this plea of set-off certainly grows out of the transaction upon which the suit was brought. Again, our statute is very liberal in its provisions on this question. Code, p. 812, c. 126, s. 4, provides that “in a suit for any debt the defendant may at the trial prove and have allowed against such debt, any payment or set-off which is so described in his plea or in an account filed therewith as to give the plaintiff notice of its nature but not otherwise.” This provision seems to have been fully complied with in this case. The plaintiff insists that the defense should not prevail, because the money in defendant's hands was the proceeds of taxes, and cites the case of *Miller v. Wisner*, 30 S. E. 237, lately decided by this Court, which merely holds that a party owing taxes cannot set off his private demand against the sheriff in payment thereof, and does not apply. When we look again to the facts of this case, it is apparent that the contract between the plaintiff and said Baker was not terminated by his discharge or removal, the only thing done being to relieve him of a part of his duties he was required to perform. What motive actuated plaintiff in taking this step, we cannot say. It may have been that he was not satisfied with the manner in which he was accounting for the collections placed in his hands; but, if so, why did he still allow him to collect in Middleway district? It may have been that he was aware that the defendant had performed more than his proportion of the work during the

years 1889-90, and it may have been that he wanted to give his son employment. But, let the motive be what it may, the defendant protested against his labor being reduced, and signified his willingness to continue. It appearing from the evidence that, at the time the books of Charles-town district were taken from the defendant, no change was made in the contract in regard to compensation for services, and it further appearing that, taking the entire four years of the sheriff's term into consideration, the defendant performed one-third of the services, I hold that the court erred in overruling the motion of the defendant for a new trial. The judgment is therefore reversed, the finding of the court set aside, and a new trial awarded.

Reversed.

CHARLESTON.

GRIFFIN v. HAUGHT.

45 460
146 787

Submitted June 11, 1898—Decided Dec. 3, 1898. □

1. JUDGMENT—*Validity of Judgment—Justice of the Peace.*

A judgment rendered by two justices sitting together is not void for that reason. (p. 464).

2. JUDGMENT—*Validity of Judgment—Justice of the Peace.*

When two justices sit together at the trial of a case, and no objection is made thereto at the time, the validity of the judgment cannot afterwards be questioned on that account. (p. 464).

3. RECORD—*Pleading—Justice of the Peace.*

When there is no note in the record of the filing of complaint

or answer in an action originating before a justice, but there is copied into the record both a complaint by the plaintiff and an answer by the defendant signed by them respectively, with which the evidence of the parties adduced on the trial is entirely consistent, and the record shows there was a full and fair trial, the court will presume that the pleadings were so made up. (p. 465).

Error to Circuit Court, Doddridge County.

Action by H. C. Griffin, assignee of M. Chapman, against M. L. Haught. Judgment for plaintiff, and on appeal to circuit court judgment was again rendered for plaintiff and on the appeal bond. Defendant brings error.

Affirmed.

J. V. BLAIR, for plaintiff in error.

G. W. FARR, for defendant in error.

McWHORTER, JUDGE:

On the 20th of October, 1893, H. C. Griffin, assignee of M. Chapman, sued out a summons before C. A. Trough, justice of Doddridge County, against M. L. Haught, returnable November 7, 1893, at which time the parties appeared, and the defendant filed his affidavit for a continuance, which was granted until November 14, 1893, on which last-mentioned day (T. J. Haskins sitting with C. A. Trough, justice) the parties appeared by their attorneys, and the defendant moved to quash the summons in the case for irregularities, which motion was overruled, and the case put on trial; and, the evidence being heard, judgment was rendered for the plaintiff for one hundred and forty-three dollars and fifty-five cents, and ten dollars and fifteen cents, costs of the action, from which judgment the defendant appealed to the circuit court of Doddridge County, and filed his bond in the penalty of three hundred dollars, with Harvey Smith as his surety. On the 28th of November, 1894, a jury was impaneled in said court, and, having heard the evidence, the jury, on the 29th of November, returned a verdict for the defendant in the sum of seven dollars, when the plaintiff moved the court to set aside the verdict of the jury, and grant him a new trial, because the verdict was contrary to the law and

the evidence, of which motion the court took time to consider; and afterwards, on the 27th day of November, 1895, the court sustained the motion on condition that plaintiff pay the costs of the former trial. On the 24th of November, 1896, another jury was impaneled, and, having heard the evidence and arguments of counsel, returned a verdict for plaintiff for one hundred and sixty-eight dollars and ninety-eight cents, when the defendant moved the court to set aside the verdict and grant him a new trial, because the verdict was contrary to the law and the evidence, of which motion the court took time to consider; and on the second day of December, 1896, the court overruled the motion, and entered judgment against said Haught, and Harvey Smith, his surety, on the appeal bond, to which action of the court the defendant excepted, and tendered three several bills of exception, which were signed and made a part of the record.

Defendant applied for, and obtained from this Court, a writ of error to said judgment, on the following assignments of error: (1) That the trial had on the 14th day of November, 1893, before C. A. Trough and T. J. Haskins, justices of the peace, was without authority of law; that jurisdiction of the case was then lost; that the said judgment of said justices was null and void, and the circuit court obtained no jurisdiction to hear and determine said action by trial, and the same should have been dismissed by said court. (2) That said circuit court erred, on the 27th day of November, 1895, in setting aside said verdict theretofore rendered in favor of said defendant. (3) The court erred in giving to the jury the instructions embraced in bill of exceptions No. 1, especially the last section thereof, which wholly ignores the answer or plea of defendant, alleging fraud and deception, and the evidence showing misrepresentation as to and suppression of the fact of payment of said oil-lease rental or forfeit money, and because said last clause conflicts with the other parts of the instruction, and had a tendency to confuse and mislead the jury. (4) The court erred in refusing to give the instruction asked for on behalf of the defendant, and set forth in the second bill of exceptions. The contract and deed show that said Haught was entitled to all the

yearly rental under said oil lease, except for forty-five days; and, if the contract had not so specifically fixed this, the statute does. (5) The court erred in overruling said motion to set aside said verdict, and in rendering said judgment for one hundred and seventy-nine dollars and fourteen cents, with interest thereon at ten per cent. from the 24th day of November, 1896, until paid, and costs.

On the day the summons was returnable (November 7th), the defendant appeared, and moved for a continuance. On the 14th of November, when the case was called for trial, the defendant moved to quash the summons, for the reason that it was addressed "to L. G. Duff, a special constable," and no appointment was noted in the docket, in compliance with sections 30 and 31, chapter 50, Code. The object of service of process is to bring the party into court; and the appearance to the action in any case for any other purpose than to take advantage of the defective execution or nonexecution of process places a defendant in precisely the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or nonexecution of process upon him. *Mahany v. Kephart*, 15 W. Va., 609; *Bank of the Valley v. Bank of Berkeley*, 3 W. Va., 386; *Venable v. Coffman*, 2 W. Va., 310. The defendant's first appearance was on the return day, so that when he moved to quash, on the 14th of November, the day to which he had it continued, his motion could not be entertained, under the authorities above cited; but, if that had been his first appearance, it must have been a special appearance for the purpose only of quashing the summons or return, and it must be so stated in submitting his motion. *Layne v. Railroad Co.*, 35 W. Va., 438, (14 S. E. 123); *Blankenship v. Railway Co.*, 43 W. Va., 135, (27 S. E. 355).

It is insisted that Justice Trough lost jurisdiction because Justice T. J. Haskins sat with him at the trial. The Constitution Art. VIII. Sec. 28 provides that "the jurisdiction of justices of the peace shall extend throughout their county." It is admitted that Haskins was a justice of the peace of that county. He had concurrent jurisdiction with Justice Trough; and, in case it be for any reason improper for the justice issuing the summons

to try the case, another justice of the same county may attend and hear it in his place. Code, c. 50, ss. 14, 15. There is no statute providing that two justices may sit together in the same case, nor is there any prohibiting it. At most, it could be nothing more than an irregularity, which, unless taken advantage of at the time by motion or objection, must be held to be waived. A judgment rendered by two justices sitting together would not be void. The only case I find in which a judgment was rendered by two justices is that of *McClain v. Davis*, 37 W. Va., 330, (16 S. E. 629). While the question of the right of two justices to act together is not raised in the case, the fact of their joint action is referred to, not only in their opinions (there being a dissenting opinion), but in the syllabus of the case, without criticism on that point. It is no uncommon occurrence for the trial justice to invite a brother justice to sit with him at a trial. Having commenced an action properly within his jurisdiction, the same cannot be ousted by irregularities or errors, but the same may be corrected by appeal. 1 Black Judgm. § 244, says: "In any case where the court has jurisdiction of the subject-matter of the action, and the parties are before it by due service of proper process, the jurisdiction is never ousted by the erroneous exercise of the power which it confers; and the judgment in the case, though it may be marked by error which will cause its reversal by a higher court, is not for that reason void," and cases there cited. Appellant cites *Hutch*, W. Va., Treatise, 12, and *Todd v. Gates*, 20 W. Va., 469, in support of his proposition,—want of jurisdiction, I fail to see wherein these authorities aid him. The Constitution and statutes prescribe the jurisdiction of justices. The amount here claimed is clearly within his jurisdiction. While the note sued on was originally of greater amount than would be within his jurisdiction, it was reduced by legitimate payments before suit was brought, and the action was for the balance, and it is not claimed that the amount was reduced by feigned credits.

Appellant claims that no pleading, either complaint or answer, were filed before the justice, and no oral pleading noted in the transcript. The first order made in the case by the circuit court, as appears from the record, was on

November 28, 1894, when parties to the action appeared by their attorneys, a jury was impaneled, and the case was tried without objection for want of pleadings, and a verdict rendered on the next day, November 29, 1894, for the defendant. The defendant raised no objection or question about the pleadings at any time while the case was pending in the circuit court. The record shows, by bills of exception taken by defendant after the last trial, that evidence was adduced by both plaintiff and defendant in support of their claims respectively, and "there was a full trial as if on plea and issue," *White v. Emblem*, 43 W. Va., 819, (28 S. E. 761). And, while the record fails to note the filing of either complaint or answer, there is copied into the record both a complaint and answer of plaintiff and defendant, signed by them respectively, with which the evidence of the parties adduced on the trial is entirely consistent; and, the record showing that there was a full and fair trial, the court will presume that the pleadings were so made up.

As to the second assignment, there is nothing in the record to show what evidence was given at the first trial in the circuit court, or what rulings of the court, if any, were to the prejudice of appellant; no exceptions being taken to enable this Court to see whether the verdict was contrary to the law and the evidence, or not. "In the absence of a bill of exceptions making the evidence of facts proved on the trial a part of the record, this Court will presume that the judgment of the court below was proper." *Todd v. Gates*, 20 W. Va., 464 (Syl. point 6).

Considering the third assignment, it is only the last clause of the instructions given by the court that is complained of, and which is as follows: "If the rental money was collected by Chapman before he sold his land to Haught, then the same did not pass to Haught, either by the contract of sale or assignment of the oil lease;" and viewed in the light of the contract between the parties, dated 22d of April, 1891, and of the deed of date August 18, 1891, and of the lease, let us see whether that clause of the instruction is bad or liable to objection. The said contract contains this provision: "It is further agreed that inasmuch as the land described in this article is leased for

oil and gas purposes to the parties known as Koen and Millan, that the said M. L. Haught accepts the obligations of said lease, and is to have all the profits and benefits resulting therefrom from the date of this article." And the deed for the land to Haught from Chapman dated 18th of August, 1891, and acknowledged on the 31st of the same month, contains the following provision: "It is further herein stipulated and agreed that said general warranty is not to operate as a warranty against a certain lease given on said land by the party of the first part for oil and gas purposes to the firm of Koen and Millan; but the party of the second part, M. L. Haught, accepts the obligations of said lease so given by the party of the first part, and is to have all the profits and benefits resulting from said lease from the 22d day of April, 1891, and the said party of the first part, Maxfield Chapman, is to have all benefits and profits of said lease up to April 22, 1891." The lease is dated March 8, 1890. Under its provisions, a test well was to be commenced on the premises within three months, and to be completed within nine months from its commencement; and, in case of failure to complete it within the time specified,—i. e. within one year from March 8, 1890,—the lessees were to pay to the lessor a yearly forfeit thereafter of one hundred and fifty dollars, and the lessor was to accept said amount as satisfactory compensation for such delay until said well should be completed. Now, it is insisted by the appellant, because of the use of the word "thereafter," the forfeiture did not begin until March 8, 1891; and it might so appear but for a further provision in the lease, immediately following the other, that "said forfeiture shall be deposited to the credit of the first party, at Merchants' National Bank of Clarksburg, West Virginia, or paid directly to said first party, and a failure to complete such well or pay said forfeit within the above-specified time therefor, or within the ninety days thereafter, shall render this lease null and void." Notwithstanding the language that "a yearly forfeit thereafter" of one hundred and fifty dollars should be paid, the first forfeit under the express provisions of the lease became due and payable at the end of twelve months from the date of the lease, and could only have been a for-

feit for that year, as there was yet no default for any subsequent time. The lease was for a term of five years from its date, and as much longer as oil and gas should be found in paying quantities, or the rental paid thereon. So, there were continuing benefits arising from said lease from its date, at the rate of one hundred and fifty dollars per year, which, under the express terms of the contract, and later under the deed of August 18, 1891 (which was accepted by appellant, and recorded by him November 20, 1891), were to go to the appellee up to April 22, 1891, and after that date to appellant.

The line of defense as disclosed by the testimony is strictly in harmony with the written contract of April 22d, the deed of August 18, 1891, and with the lease of March 8, 1890, except that the defendant claims the benefits of the lease prior to April 22, 1891, while the contract and the deeds say the benefit of the lease shall accrue to him from April 22, 1891. It is not claimed that appellee collected more than the first year's rental or forfeit, and that was, under the lease, payable before the parties began to negotiate for the sale and purchase of the land. The clause of the instruction excepted to is not inconsistent with the first part of the instruction, nor is it bad under the theory upon which the case seems to have been tried.

This also disposes of the fourth assignment,—that the court erred in refusing the instruction set out in the second bill of exceptions, as follows: "The jury are instructed that under the contract between M. Chapman and M. L. Haught, bearing date the 22d day of April, 1891, M. L. Haught was entitled to his proportional share of the yearly forfeit money of the \$150, under the lease * * * dated March 8, 1890, and assigned to the South Penn Oil Company, the proportional share being as 45 days to Chapman and 320 days to Haught." This instruction was properly refused, because it is clearly in conflict with a proper construction of the lease as above set out, and was evidently so construed by the trial court. It follows that the court did not err in overruling the motion to set aside the verdict of the jury, and grant a new trial; and the judgment rendered by the court for one hundred and seventy-nine dollars and fourteen cents, with

interest at ten per cent. thereon until paid, and costs, was authorized by section 172, chapter 50, of the Code, and is affirmed.

Affirmed.

CHARLESTON.

LAWYER v. BARKER *et al.*

45 468
45 510

Submitted Sept. 10, 1898—Decided Dec. 3, 1898.

1. FRAUDULENT CONVEYANCE—*Deed of Trust.*

The syllabus in the case of *Grocer Co. v. Williams*, 43 W. Va., 323, and in *Casto v. Greer*, 44 W. Va., 332, are affirmed. (p. 472).

2. FRAUDULENT CONVEYANCE—*Deed of Trust—Creditors—Preferred Creditors.*

Where an insolvent debtor conveys all the property owned by him, being the equity of redemption in a certain tract of land in trust to secure future repairs to be made thereon, and it does not appear that such repairs added to or enhanced the value thereof, such conveyance will be held void, under section 2, chapter 74, of the Code, as to the preference thereby secured. (pp. 470, 471).

Appeal from Circuit Court, Morgan County.

Action by Charles W. Lawyer against John H. Barker

and others. From the decree rendered, defendant S. A. Westenhaver appeals.

Affirmed.

FLICK, WESTENHAVER & BAKER, for appellant.

T. W. B. DUCKWALL and M. T. INGLES, for appellees.

DENT, JUDGE :

S. A. Westenhaver appeals from certain decrees of the circuit court of Morgan County rendered in the case of Charles W. Lawyer, trustee, against John H. Barker, and others. The facts are as follows: John H. Barker, an insolvent, on the 13th day of December, 1893, conveyed his whole estate, consisting of an equity of redemption in a certain tract of land, to D. C. Westenhaver, trustee, to secure to the defendant S. A. Westenhaver, the payment of the sum of four hundred and sixty-five dollars, evidenced by note now held by the Citizens' National Bank of Martinsburg. This note was given in payment of repairs to be thereafter made by the payee on the property conveyed, and which were completed within about two months from the date of the transaction. The property sold under a prior deed of trust, and the surplus representing the equity of redemption, were brought into court for its disposition. Appellant claimed that the whole amount should first be applied to the payment of his trust debt, while the other creditors of Barker insisted that the trust deed having been executed by an insolvent debtor, was an unlawful preference, and amounted to a general assignment for the benefit of Barker's creditors, and that the fund realized should be divided *pro rata* among all the creditors whose debts existed at the time of the execution of such trust. The circuit court took the latter view, and distributed the fund *pro rata*. Appellant insists that this was error, for the reason that his debt was not in existence at the time of the execution of the trust, and that, therefore, he is entitled to be regarded as a *bona fide* innocent purchaser, without notice, but, if not, that the limitations provided in Acts 1895 apply to his trust. To sustain either or both of these positions, this Court is asked to review the so-styled

"hastily and ill-considered" decisions of *Grocer Company v. Williams*, 43 W. Va. 323, and *Custo v. Greer*, 44 W. Va. 332; yet no argument or principle of law is adduced which was not fully weighed and carefully considered before the above decisions were handed down. All deed of trust creditors are, under certain circumstances, to be regarded as purchasers for value, but, generally speaking, they are nothing more than creditors. Because a person takes a deed of trust from an insolvent, to secure future advances to be made to him, does not make him any more a purchaser for value than any other creditor; and his very action enables the debtor to place his property beyond the reach of his creditors, and throws upon such person the duty of showing the *bona fides* of the transaction; and this cannot be satisfied by merely showing that the advances were made, but it must also be shown, in case they were to be in the shape of repairs, that such repairs were necessary, and added to the value of preservation of the property. The question of fraud was not raised in this case, however; and it appears to be fully proven that repairs to the full extent of the note given were put upon the property; yet there is no evidence showing the character or necessity thereof, or that they in any degree enhanced the value of the property. A vendor's lien is a specific common law lien though modified by statute, while at common law no lien exists on real estate for borrowed money expended or repairs put thereon; hence they are not to be compared together in considering a statute forbidding illegal preferences. A mechanic's lien is purely statutory, had no existence at common law, and can be obtained only in the manner provided in the statute. A deed of trust cannot be made a substitute therefor. Both a vendor's and mechanic's lien can be had without the assistance and against the will of the debtor, and are protected by that clause of section 2, chapter 74, Code, which provides "that nothing in this section shall be taken or construed to change, impair or affect any prior lien, priority or incumbrance acquired by a creditor on the real estate of such debtor in any manner now prescribed by law." This clause is limited to liens acquired by the creditor on the real estate of an insolvent debtor without the latter's

assistance or in *invitum*. *Refining Co. v. Quinn*, 39 W. Va. 535, (20 S. E. 576.)

A deed of trust for future advancements or repairs may enable the debtor to place his property beyond the reach of his creditors. The repairs may be fictitious, valueless, or injurious to the estate. The appellant simply proved by his own testimony that he made repairs to cover the amount of the note given. If he had shown that the equity of redemption conveyed as his security was of little or no value, or that the repairs put on the property enhanced the value thereof to their full extent, he might have good grounds to ask the interposition of a court of equity, for the reason that the trust only covered such repairs, and amounted, in effect, to a mere reservation of title or purchase-money lien on his own property, and was therefore, as held in the case of *Johnson v. Riley*, 41 W. Va. 140, (23 S. E. 698,) not to the prejudice of existing creditors. Nothing of this kind is attempted, and, so far as the record shows, the repairs did not enhance the value of the equity of redemption; but this subsequent creditor, simply because he is subsequent, asks that the funds be turned over to him, for the reason that he took the precaution, knowing the debtor was insolvent, to have him convey his property in security therefor before the repairs were made. "Ignorance of law excuses no one." He undertook this matter fully advised as to solvency, and his legal rights in the premises; and, if the repairs did not add to or enhance the value of the land, he should not have made them. He did so at his own risk, with the statute before him. Having mingled his property with that of another, the burden is on him to distinguish between the two, and separate them; otherwise, he must be the loser. If he had been able to do so, and thus established the equivalent of a purchase-money lien secured by the reservation of title, he might possibly be held to have an equitable priority to the extent of his repairs or the enhanced value, and thus occupy the place of a preferred creditor, unaffected by the statute, but, as the matter now stands, he cannot be placed on any higher grounds than any other co-existing creditor of the insolvent. He loses; so do all other creditors lose. His property would not be given to them for nothing, nor

will their property be given for something which is a loss to him, but valueless to them. If he had loaned the debtor the money, he could have placed it beyond the reach of his other creditors; thus they would have been defrauded. Devoting it to apparently useless repairs, adding nothing to the real value of the property, is the same in effect. The case of *Walker v. Burgess*, 44 W. Va. 399, (S. E. 99), deals with a general statute of limitations, is further reaching, and approves the case of *Casto v. Greer*. The fact that other courts have legislated on the subject of the statute of limitations is not good reason why this Court should do so, especially in disregard of many of its own decisions to the contrary. No good reason appearing why the principles settled in the cases of *Grocer Company v. Williams*, and *Casto v. Greer*, cited, should be overruled, the same are hereby approved; and the decree complained of; being in accordance therewith, is affirmed.

Affirmed.

CHARLESTON.

PARSONS v. AULTMAN, MILLER & Co.

45	473
48	301
45	473
657	578

Submitted Sept. 18, 1898—Decided Dec. 3, 1898.

1. JUSTICE OF THE PEACE—*Proceedure—Continuance—Absence of Justice—Judgment—Notice.*

If a justice fail to attend to try a case pending before him at the hour set, and no other justice appears to try the case at that time, when the hour has elapsed the case stands continued, by operation of law, for one week. After such continuance has been consummated by the necessary lapse of time, one of the parties to the suit, in the absence of and without the consent of the other, cannot call in another justice to proceed with the trial of the case. If he does so, his judgment is without jurisdiction, and void, and may be set aside by the original justice, in custody of the docket and papers, on motion, after notice to the opposing party. (p. 476).

2. JUSTICE OF THE PEACE—*Judgment—Vacating Judgment—Appeal.*

If such justice refuse to set aside such judgment and rehear such case, an appeal will lie from his judgment to the circuit court, as in other cases; and if he refuse to grant the same within ten days, the circuit court of the county, or judge thereof in vacation, may grant the same on application. (p. 476).

3. CERTIORARI—*Appeal.*

The statutory remedy of *certiorari* to judgments of justices in civil cases is merely a form of appeal. (p. 477).

Error to Circuit Court, Jackson County.

Action by E. B. Parsons against Aultman, Miller & Co. before a justice of the peace. Judgment for plaintiff.

From an order of the circuit court quashing the writ of *certiorari*, defendant brings error.

Reversed.

JOHN H. RILEY, for plaintiff in error.

W. A. PARSONS and J. A. WODDELL, for defendants in error.

DENT, JUDGE :

On the 30th day of April, 1895, E. B. Parsons commenced an action before W. P. Kerwood, a justice of Jackson County for the recovery of three hundred dollars, against Aultman, Miller & Co., a foreign corporation. An attachment was issued, and several persons were summoned as garnishees. On the 1st day of July, 1895, without service of process or appearance on the part of defendant, a judgment was rendered for three hundred dollars against defendant, and several judgments against garnishees, aggregating two hundred and ninety dollars and eight cents, and certain property attached was ordered sold. On the 10th of December, 1895, the defendant appeared, and obtained a rehearing, which was fixed for 27th December, 1895. On that day it was continued until the 25th January, 1896, at 10 o'clock A. M. On that day it was continued on motion of plaintiff, and at his costs, until the 29th of January, 1896, at the same hour. On that day it was continued until the 6th day of February, at the same hour by agreement of parties. On the last-mentioned day Justice Kerwood was ill, and remained away from his office; and at 2 o'clock P. M., another justice, J. D. Clinton, having been called in to try the case, a jury was impaneled and a trial had, resulting in a verdict of three hundred dollars for plaintiff, on which said Justice Clinton entered judgment in Justice Kerwood's docket. On the 13th day of February, 1896, Justice Kerwood appears to have been still ill; and on the 20th day of February, 1896, between the hours of 10 and 11 A. M., the defendant appeared, filed the affidavits of John H. Riley and Justice Clinton, and having served notice on the plaintiff, and his attorney, William A. Parsons, being present, moved Justice Kerwood to rehear said action, to which motion plaintiff objected, and the justice, on con-

sideration thereof, overruled and disallowed the motion, and on the same day the defendant filed an appeal bond, and demanded an appeal from the refusal of the justice to rehear the action, but the justice refused to allow the appeal. On the 4th day of March, 1896, the circuit court, on application of the defendant, granted a writ of *certiorari*. And on the 9th day of November, 1896, on motion of the plaintiff, the circuit court quashed the writ as improvidently awarded, and dismissed the petition.

The first question presented is as to whether the order entered by Justice Kerwood on the 20th day of February, 1896, refusing to grant a rehearing, is an appealable order. It is undoubtedly a final judgment, and is therefore a subject of appeal as to all questions then determined by the justice. It is provided in section 70, chapter 50, Code, that "when the defendant does not appear and judgment is rendered against him in his absence, the justice may set aside the judgment within fourteen days thereafter on motion of defendant and payment of costs." The judgment of Justice Clinton was rendered on the 6th of February, 1896; hence the motion was in time.

The next question, is was the motion before the proper justice? Justice Kerwood issued the summons, he was the custodian of the papers, and the judgment was on his docket. The motion was made, not on the grounds of any defect in the judgment itself or the conduct of the jury trial, but because the justice who rendered it was without authority of law to hear and determine the case, was a mere voluntary intermeddler, and a judgment was therefore void, and did not oust the jurisdiction of Justice Kerwood to hear and determine the case. This was a proper question to present to Justice Kerwood. If a voluntary intermeddler, without authority of law, took possession of his office during his illness and absence, and entered judgments on his docket on suits pending before him, such judgments would not be binding, and he would have the right to disregard and annul the same. The record shows that by agreement the trial of this case was set for 10 o'clock A. M., the 6th day of February, 1896; that Justice Kerwood was ill; and that a jury trial was had in the absence of the defendant, at 2 o'clock P. M.; and the affi-

davit of Justice Clinton, which was made part of the record on the motion for rehearing, shows that he was not called into the case until the afternoon, and that he did not know of its pendency until 12 o'clock noon. It is therefore plain that he was not there at 10 o'clock A. M., the hour set for trial, nor until two hours thereafter. Section 64, chapter 50, Code, provides: "No action shall be discontinued on account of the absence of the justice. If he fail to attend on the return day of the summons or at the time to which the action stands continued, any other justice of the same county may attend and try the case, or continue it for not exceeding thirty days; and if he do so shall make and sign an entry thereof on the docket of the absent justice. If not tried or continued by another justice aforesaid, it shall stand adjourned one week, and so on from week to week until disposed of." In the absence of either party to make the action of the attending justice legal, the record must show that his attendance was at the time or hour set for trial by the previous order; for a party to a suit cannot wait until the hour for trial has passed, and the case is continued by operation of law, and his opponent has gone away, and then, without notice to him, call in another justice, have the case taken up for trial by jury, and thus obtain a nonappealable judgment. Such practice should be thoroughly condemned. Justice Clinton is free from blame, as he was imposed upon by the plaintiff, not being cognizant of the facts in the case, yet his action was none the less illegal and void. A judgment rendered by a justice without jurisdiction is void, and it may be reversed by *certiorari* at common law. *Crandall v. Bacon*, 20 Wis. 639. In the continuance of causes, the statute must be strictly conformed to; otherwise the justice loses jurisdiction. *Doctor v. Hartman*, 74 Ind. 225. If a cause is not tried at the appointed time, or within one hour, as a general rule it stands continued by operation of law, unless the justice at the time is engaged in the trial of another action. *Hunt v. Wickwire*, 10 Wend. 102. The power is inherent in every court or tribunal to vacate entries in its record of judgments, decrees, or orders, rendered or made without jurisdiction. 1 Black Judgm. 307. The justice having refused to grant the defendant an appeal within ten days, he had a right, after

that time, to apply to the circuit court for an appeal, under section 174, chapter 50, Code. *Lowther v. Davis*, 33 W. Va. 132, (10 S. E. 20). This case is not subject to either the case of *Barlow v. Daniels*, 25 W. Va. 512, or *Hickman v. Railroad Company*, 30 W. Va. 296, (4 S. E. 654 and 7 S. E. 455), for the reason that it is not an attempt to re-examine a fact tried by a jury, but to nullify a judgment rendered by a justice not having jurisdiction. The defendant, instead of applying for an appeal, applied for the statutory writ of *certiorari*; both being the same, in effect, as to questions of law raised, except that *certiorari* is said not to lie where an appeal is the proper remedy. In the case of *Fouse v. Vandervort*, 30 W. Va. 327, (4 S. E. 298), the word "appeal" was held to mean *certiorari*; and in the case of *Long v. Railroad Company*, 35 W. Va. 333, (13 S. E. 1010), the present statutory *certiorari* was held to be, in effect, an appeal. The two have therefore become, so far as applied to the review of civil cases before justices, synonymous terms, except that the *certiorari* appeal is granted as a matter of sound discretion, and the appeal *certiorari* is granted as a matter right. The matter involved here is purely a question of law. The court should have disregarded the language of the petition, as it sufficiently appears on its face what remedy is sought, and granted an appeal, with *certiorari* to remove the proceedings. If it was regarded as a mere petition for *certiorari*, it would have to show good cause why it was not applied for in ten days. This requirement, however, is satisfied with the fact that an appeal lay and was refused by the justice. *Lowther v. Davis*, cited. This being true, it was not necessary to show any other cause for not having presented the petition in ten days, treated as a petition for an appeal, or *certiorari*, or both, as it really is in effect.

On the motion to quash the writ and dismiss the petition, it was proper to hear *ex parte* affidavits tending to show that there was some arrangement between the attorneys that the case was not to be taken up until a certain railroad train arrived, and that such train did not arrive until about noon. Such matter, if at all admissible, should have been presented before the justice on motion to rehear the judgment; but it is probable that when the defendant's

agents heard of the illness of Justice Kerwood they took it for granted that the case would be continued and not tried. If there was such arrangement, the previous continuance should have been in accordance therewith. The plaintiff was undoubtedly endeavoring to take advantage of the absent defendant, and the circuit court should have avoided the judgment thus obtained as a nullity, set aside the verdict of the jury, and directed a rehearing of the case on its merits. The judgment complained of, dismissing the defendant's petition, is reversed, the judgment of Justice Kerwood overruling his motion is reversed, the judgment of Justice Clinton is vacated and annulled, and the verdict of the jury is set aside, and this cause is remanded to the circuit court, to be therein tried and disposed of as the law requires.

Reversed.

CHARLESTON.

STATE v. CHENEY *et al.*

Submitted Jan. 15, 1897—Decided Dec. 3, 1898.

1. **TAXATION—Forfeiture—Nonentry—Constitutional Law.**

Under the act 1869, and under section 6, Article XIII of the Constitution, forfeiting land for nonentry on the tax books, where a tract lies partly in one county and partly in another, entry in the county wherein the greater part lies saves the whole tract from forfeiture. Entry in either county would likewise save it. (p. 480).

2. **TAXATION—Forfeiture—Nonentry—Patent—Constitutional Law.**

Where a patent is for a tract of land of a given number of acres, and it is entered for taxes accordingly, the fact that the tract contains a greater quantity will not forfeit the whole or the excess

for nonentry for taxation, under chapter 125, Acts 1869, or section 6, Article XIII. of the Constitution (p. 482).

3. TAXATION—*Forfeiture—Nonentry—Constitutional Law.*

Acts 1869, chapter 125, and section 6, Article XIII. of the State Constitution, forfeiting land for nonentry for taxation, are not repugnant to amendment 14 of the Constitution of the United States. (p. 482).

Appeal from Circuit Court, Clay County.

Bill by the State against M. A. Cheney and others to sell forfeited lands. Bill dismissed and the State appeals.

Affirmed.

E. R. ANDREWS, for the State.

BROWN, JACKSON & KNIGHT, for appellees.

BRANNON, PRESIDENT :

In 1895 the State filed its bill in chancery in the circuit court of Clay County, against M. A. Cheney and others, to sell ten thousand acres of land as forfeited for nonentry for taxation, and the court decreed that the land had not been forfeited, and dismissed the bill, and the State appeals. On July 21, 1797, Virginia, by patent, granted to Jacob Skyles a tract described as containing thirty-two thousand and ninety-seven acres of land in Kanawha County; and after Nicholas County was formed, the land was in it; and, after Clay County was formed, a quantity of ten thousand acres of the tract fell in Clay County. None of this land was entered for taxation in Clay from its formation, in 1858, to 1891; but ten thousand acres of it was in that year, and up to 1895, charged there with taxes. The tract was charged in Kanawha, and afterwards in Nicholas County, from the date of the grant till 1894, and all taxes paid. In 1869 a survey revealed the fact that the tract contained a greater acreage than the patent stated, forty thousand three hundred and seventy-two acres, instead of thirty-two thousand and ninety-seven. Before this the charge for taxation had been largely less than the true quantity: but after 1869 it was charged at Forty thousand three hundred and seventy-two acres in Nicholas. It is on the omission to charge any of it in Clay from 1858 to 1891 that the bill bases its prayer for the sale of the ten thousand acres lying

in Clay. True, the argument of counsel refers to the fact that up to 1869 too small a quantity was charged in Nicholas; but that, if material, is not a fact stated in the bill as a basis of relief, but only the omission in Clay. The charge in Nicholas was for quantity on the basis of the patent call, less some sales from time to time, up to 1869, when the survey disclosed a greater area, after which it was entered for that quantity. In fact, when the county court of Clay entered ten thousand acres for taxes in that county, and the true quantity was still kept up in Nicholas, there was double taxation for several years; but that is not material.

Does the fact that the land was charged in Nicholas, when part of it was in Clay, forfeit that part in Clay? I do not understand the State's counsel as distinctly taking this stand. If he so mean, the stand is not tenable. Forfeiture of lands is a harsh, even dreadful, remedy; and courts lean from it, and never apply it except where the law clearly warrants. The above question is to be answered, first, under the act of 1869, (Code 1868, c. 31, s. 34; Acts 1869, p. 90), and then under section 6, Article XIII., Constitution, as there was no forfeiture law from 1835 till 1869, though that of 1869 retroacted to 1832. This act of 1869 declared a forfeiture for five successive years of nonentry "on the land books of the proper assessor." Which was the proper assessor? The act of 1859-60 (Code 1860, c. 35, s. 26) says: "Land lying partly in one county and partly in another shall be entered by the commissioner of the county in which the greater part lies, but entry and payment of taxes in the county where any part is situated, shall, for such time, be a discharge of so much of the taxes as may be so charged and paid." Acts 1863, c. 118, s. 25, was likewise. As the greater part of this land was in Nicholas, its entry there was "on the proper assessor's land book," thus complying with the act of 1869. From 1858 to 1869 the law did not require this land held under one patent as an entire tract to be divided as to assessment, so as to charge part in Clay. So there is clearly no forfeiture under the act of 1869. After that act, till the Constitution of 1872, that was still the rule, under section 32, chapter 29, Code 1868.

Next, as to the Constitution: What did it demand? "It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with state taxes on said land, then by operation hereof, the land shall be forfeited and the title vest in the State." This does not demand of the owner that he shall survey his land to see in which county the greater part lies, and that he shall run the risk of losing it if he errs therein, but relieves it from forfeiture if any part lies in the county wherein he enters it for taxation. The Constitution, as also the act of 1869, forfeited only for failure to pay state taxes; and it was immaterial as to state taxes in which county it was charged, as they would be paid wherever charged. So, the entry in Nicholas saved from any forfeiture. Acts 1875, c. 54, s. 32, directed the assessor to enter the land in the county where its greater part lay. Chapter 98, Acts 1877, directed that it be charged by the assessor in the county wherein the greater part in value lay, but provided that entry and payment in any county where any part lay should be a discharge for the whole state taxes on it. So did the act of 1879. The Act of 1881 (Code 1891, c. 29, s. 32) enacts, as to tracts of more than one thousand acres lying in different counties, that they shall be entered in each magisterial district to the extent, as near as may be, the same lies therein. This was the first act cutting an entire tract up for taxation. It was to let each county and district have its share of tax. But what is this? It is only directory to the officer. As to the landowner, the paramount Constitution says his land shall not be forfeited, if entered where any part of it lies. The Constitution repealed the act of 1869, and so its exaction, that, to save forfeiture, the entry should be on the land book "of the proper assessor," ended. Up to the act of 1881 the assessment was in the proper county. Under it the clerk should apportion: But that is immaterial as regards forfeiture. Therefore entry in Nicholas clearly prevents forfeiture unless entry for too small a quanti-

ty produces forfeiture. The State claims that it forfeits the excess beyond question. I think it beyond question that it does not.

Before the patent to Skyles, the surveyor surveyed the entry, reported quantity, the State issued a grant for that quantity, and entry for taxation was of the tract as such, not of or by acres, but by exterior boundary, we may say. It cannot be that if a patent calls for five thousand acres, but its boundaries include six thousand, any of it is forfeited, It is the tract entered, not acres. Does the patentee know of the excess? The State has certified it to be five thousand acres. Whose tract would be safe? Old grants have often been found to contain excess. Then, what particular part is forfeited? What right has the State to elect to take the excess out of that part in Clay? Assessment of wrong number of acres does not render it bad. *Desty, Tax'n*, 567. There is no forfeiture.

The question is raised that these forfeiture laws are unconstitutional, because in conflict with amendment 14 to the Constitution of the United States. We hold them valid, for reasons stated in *State v. Sponangle*, 45 W. Va. 415, (32 S. E. 283). We affirm the decree.

Affirmed.

CHARLESTON.

WEST VIRGINIA BUILDING CO. v. SAUCER.

45	488
45	501
45	504
45	511

Submitted Sept. 18, 1898—Decided Dec. 3, 1898.

1. MECHANIC'S LIEN—*Performance of Contract.*

If a builder has completed his work according to contract in all material, substantial features, his mechanic's lien is not lost merely because there are minor, unsubstantial, unimportant omissions or defects. (p. 485).

2. EQUITY—*Issue Out of Chancery—Decree Reversed.*

The direction of an issue out of chancery is a matter of sound discretion. The mere omission to do so would not reverse a decree unless it was asked for. (p. 487).

Appeal from Circuit Court, Grant County.

Bill by the West Virginia Building Company against Thomas J. Saucer. Decree for plaintiff, and defendant appeals.

Affirmed.

J. M. McMULLAN, for appellant.

F. M. REYNOLDS and L. J. F. FORMAN, for appellee.

BRANNON, PRESIDENT :

The West Virginia Building Company brought a chancery suit in the circuit court of Grant County against Thomas J. Saucer, to enforce a mechanic's lien for the construction of a building in the town of Bayard, under written contract with Saucer, which resulted in a decree in favor of the company to sell the property, and Saucer appeals.

It is claimed for Saucer that the bill was improperly held to be good on demurrer. It is claimed that the bill does not sufficiently set out the contract, whether verbal or written, and its terms and stipulations and conditions. It is true that it is always best to set out a contract with definiteness and particularity, so far as its stipulations are pertinent to the matter to be litigated, but other matters, though in the contract need not be specified. A bill to enforce a mechanic's lien does not require very great particularity, because the account filed with the clerk, claiming the lien itself has great effect. This bill alleges that Saucer contracted with the plaintiff to erect on certain lots a large building, and to furnish certain material for same in the construction thereof, and that, in pursuance of and under said contract, plaintiff erected the building, and furnished material therefor; that it was under contract between the parties, and that the contract price for labor and material used and furnished therein all amounted to the sum of four thousand eight hundred and thirty-seven dollars and seventeen cents; that after allowing all credits to which Saucer was entitled, there was due from him one thousand four hundred and eighty-three dollars and sixty-seven cents; that plaintiff, on the 2d of February, 1896, ceased to labor on and furnish material for the building; and the bill says that the work was done and material furnished and building erected under a contract taken the—day of 1895, not saying whether written or oral. The account, claiming the lien filed in the clerk's office under the statute, was exhibited with the bill. Surely, this bill charged all that seems essential—the contract, the work done under it, the amount thereof, the date when finished, and the filing of the account. It is immaterial whether a contract be written or oral, to create a mechanic's lien. The account gives definite specifications of work, labor, and material.

It is claimed for Saucer that, when the mechanic's lien account was filed in the clerk's office, the work had not been fully completed, and therefore the account could not be filed, and created no lien. This objection goes to the very root of the plaintiff's demand. The compensation to be paid the contractor was payable in installments as the

work progressed, and it does seem to me that the builder may before the completion of the work, file his lien. Our statute gives him a lien over other liens arising subsequent to the time "when such labor shall have been performed or material furnished;" that is, as to subsequent creditors, and surely so as to the owner. I think that this lien starts from the first moment when the work or delivery of material commences, even as to such creditors, and certainly as to the owner. *Phil. Mech. Liens*, s. 216; *Oriental Hotel Co. v. Griffith*, 53 Am. St. Rep. 790. See opinion in *C. L. & M. Co. v. Buckmeyer*, 18 W. Va., 590. Suppose the builder files his lien after the lien starts, and afterwards completes the work; shall his lien be overthrown because his account is filed before completion? I would think not. I know that the Code does say that the lien shall be discharged unless the builder shall, "within sixty days after he ceases to labor on, or furnish material or machinery, file his lien account." But as said in *Luter v. Cobb*, 1 Cold. 528: "The limitation is intended for the benefit of creditors of the owners and purchasers, to protect them from fraud and injury by the operation of this secret lien." It gave that time to the mechanic to continue his lien—that is, his last point—but that does not say that he need wait until then if his lien is once commenced. He need not file his lien before that time. He may go on to work, and he has his lien from its commencement or when he began furnishing material, and the statute gives him a lien over any creditors whose liens arise after his lien commences, without any recordation, because the law gives notice to the world that the mechanic's lien attached to the building, which lien he may enforce by filing within sixty day after completion. While the work is going on, no notice is necessary; the work itself is that. But if the mechanic, after completion, waits longer than sixty days, his lien is gone; certainly, as to creditors. *Bank v. Dashiell*, 25, Grat. 625.

As installments in this case were due before the completion, I would think a lien filed before completion would be good. My idea is that a lien, though not necessary if filed at once after it commences, is good for the whole contract price when completed, and even if the work

be not completed, yet, if the party would be by law allowed to recover for what work he did or what material he furnished in an action of *assumpsit* upon a *quantum meruit* or *quantum valebant*, his lien would be good in equity for the same. But in this case it is not necessary to go so far, as this decision does not require it. The work was substantially completed before the account was filed. The defendant had made certain payments. He had taken possession of the house, and there remained to be done upon it very inconsiderable work, compared with the total. It certainly is true in law if there be a substantially completed, though not perfectly completed, contract, the claim may be filed, and the defendant may recoup or abate from the contract the value of the failure. He can claim damages for noncompletion. He has no right to forfeit all that the builder has done. If in an action at common law the builder would be allowed to recover any sum after the abatement to the owner of his damages, for the noncompletion of the contract, then in a suit in equity he would likewise recover. Justice is thus done to both parties. If the deficiencies are unimportant, and may be easily made up, the lien is still good. *Glacius v. Black*, 50 N. Y. 145; *Hayward v. Leonard*, 7 Pick. 181; *Stewart v. McQuaide*, 48 Pa. St., 191. But, in this case, Saucer accepted the building, took possession of it, rented it out; and surely, under such circumstances, he must pay what the material and work are worth—in other words, the contract price, with such abatement as the shortcomings of the contractor called for. *Bell v. Teague*, 85 Ala. 211, (3 South. 861); *Vanderbilt v. Iron Works*, 25 Wend. 665. It is very clear that any recoupment or abatement to which the owner is entitled can be allowed in chancery, in a suit by the mechanic or builder on his lien. *Phil. Mech. Liens*, s. 140. When the contract is entire, and the building substantially finished, and it is treated by all parties as completed, though some unimportant parts be not completed, if the time limited by the statute is suffered to elapse before these unimportant things are done, more especially if intervening rights in favor of a third party have attached, the lien cannot be successfully asserted. *Luter v. Cobb*, 1 Cold. 526. That treats the unimportant deficiencies as

inadequate to keep up the right to file the lien; that is, the date for filing does not run on till their completion. Conversely, it is true that those unimportant deficiencies did not prevent the builder from filing his lien, and recovering what was due him on it, less abatement for such deficiencies.

The claim is urged that the sum allowed Saucer for abatement is too small. It was one hundred and fifty-three dollars and twenty-one cents. The evidence shows that the items of work to fully complete the building were not important, but I have this to say under this head: that the recoupment depended upon a large number of witnesses, largely on their mere opinion, and this evidence conflicted, especially as to what allowances should be made for abatement. There was a great mass of evidence taken on this, and the allowance is based on mere estimates, and it cannot be expected that upon this mere question of fact, standing on conflicting evidence and inferences and deductions therefrom, this Court should reverse the finding of the circuit court. I think it substantially right. *Hall v. Hall*, 30 W. Va. 780, (5 S. E. 260); *Richardson v. Ralphsnyder*, 40 W. Va. 13, (20 S. E. 854); *Dorr v. Dewing*, 36 W. Va. 466, (15 S. E. 93).

It is claimed that the court should have directed an issue out of chancery to pass upon the question of what allowances for abatement should have been made. It is very difficult to reverse a decree for failure of the court to direct an issue, because a large discretion is given the court therein, and the rule when it should and should not do so cannot be well defined. Our Code (chapter 131, section 4) says that the court, when "there is such confliction in the evidence as in the opinion of such court to render it proper, may direct an issue." It prohibits it in any other case. This tells itself of a large discretion. *Powell v. Batson*, 4 W. Va. 610, holds that the proper criterion by which to test the propriety of such an issue is that, where in a given case, the decree rendered is sustained with reasonable certainty by the facts and circumstances, there would be no error in refusing to direct an issue to try any material matters put up in issue therein. The evidence was conflicting. It was not so particularly as to any par-

ticular fact in issue, but on this mere estimate of the value of deficiency; and the evidence does, with reasonable certainty, sustain the court's finding, as much so as in such a case could be expected. A court can and should itself decide matters of fact, and even state an account, and save the cost and time of a protracted jury trial, if it have such data and evidence to enable it to do so properly. *Darby v. Gilligan*, 43 W. Va. 755, (28 S. E. 737); Bart. Ch. Prac. 848.

A further consideration in this case is that no issue was asked. I am impressed with the opinion that when a court has used its discretion, and gone on without an issue, it cannot be reversed for omission to direct one, unless it be asked. This is sustained by *Dorr v. Dewing*, 36 W. Va. 466, (15 S. E. 93), holding that, if a cause has been heard without order of reference asked or suggested, a party cannot, for the first time in an appellate court, assign the failure to direct a reference, unless it appear that manifest injustice has been done him thereby. I should think it would be much more so in the case of failure to direct an issue than as to the failure to direct a reference to commissioner. JUDGE SNYDER says, in *McKinsey v. Squires*, 32 W. Va. 43, (9 S. E. 55), that the party should ask an issue if he wants it.

Complaint is made that there was no reference to a commissioner. I have already, by reference to the case of *Darby v. Gilligan*, answered this objection. There was no complicated account to be made before a commissioner; no ascertainment of liens and priorities. When the court, having the contract price before it for the building, made up the sum which the defendant should be allowed for recompense, the matter of the account was ended. Why could not a judge do this, as well a commissioner?

As to the complaint that the lien under the deed of trust in favor of the National Building and Loan Company was not ascertained and decreed. That company and its trustee were before the court. The decree gave the building company a first lien, and fixed its amount; and then declared that the next lien was that of the National Building and Loan Company under its deed of trust, but did not fix its amount. Note the company and its trustee are

not complaining of this ; only Saucer is. It is strange that he should complain of the failure of the court to declare that his property should be sold unless that lien, too, were paid. The decree is favorable to him in this respect, in not making him pay that deed of trust debt at once. Moreover, it was a subordinate lien. Moreover, it was a lien payable by monthly payments, as building loans usually are, and it would have been improper to decree its payment long before maturity. Of this, had it been done, Saucer could have complained ; and, as to the amount of it, it could not have been fixed. It was not yet due. He certainly knew its amount. It was not necessary that the sale should raise an amount to cover it. He had the right to go on, and pay it in monthly payments.

Complaint is made that the property was not rented, instead of sold. Now, the mechanic's lien statute commands a sale, and does not require the mechanic to wait five years for his money. He is entitled, by the very letter of the statute, to a sale. The statute, in the case of judgment liens, says that, if five years' rental will pay them, no sale shall be made, but this case is governed by the mechanic's lien statute. We affirm the decree.

Affirmed.

CHARLESTON.

CUSHWA *et al.* v. IMPROVEMENT L. & B. ASSOCIATION, *et al.*(DENT, JUDGE, *dissenting*).

Submitted June 18, 1898—Decided December 7, 1898.

1. MECHANIC'S LIEN—*Negotiable Notes.*

Where a material man, workman, laborer, mechanic, or other person, performs any labor or furnishes any material or machinery for constructing any house, mill, manufactory, or other building or structure, by virtue of a contract with the owner or his authorized agent, he shall have a lien, to secure the payment of the same, upon such house or structure, and upon the interest of the owner of the lot of land on which the same may stand; and such lien will not be affected by the party claiming the same accepting negotiable notes for the amount of his account, which notes are not made payable after the time fixed for bringing a suit to enforce the mechanic's lien. (p. 496).

2. RECEIPT—*Evidence of Payment—Oral Evidence.*

A receipt, so far as it is a mere admission, is not conclusive evidence of the payment therein acknowledged, but the party signing it may invalidate it by oral evidence of fraud or mistake; for the document amounts only to *prima facie* proof, and is capable of being explained. (p. 497).

3. NOTES—*Payment of Debt.*

A note will not be regarded as an absolute extinguishment or payment of a precedent note or pre-existing debt, unless it be so expressly agreed, whether the note received was that of one bound or a stranger. (p. 498).

4. MECHANIC'S LIEN—*Notes—Acceptance of Notes—Surrender of Notes.*

The acceptance of the note of a debtor, payable after the time granted by the statute for filing a mechanic's lien, and maturing

45	490
146	58
45	490
47	44
45	490
64	276
164	467
45	490
66	352

before the expiration of the time limited for bringing suit, will not bar a suit and recovery upon the lien, if the notes are produced to be surrendered at the trial. (p. 499).

5. MECHANIC'S LIEN—*Deed of Trust—Priority of Lien.*

Where work has been commenced and material furnished under a contract, for constructing buildings, with the owner of the land on which buildings are to be erected, the mechanic's lien attaches from the time the performance of the work and furnishing materials begin, and such mechanic's lien is entitled to priority over a deed of trust subsequently executed on the same property. (p. 501).

Appeal from Circuit Court, Berkeley County.

Bill by the Improvement Loan and Building Association and H. T. Cushwa & Bro., against the Auburn Wagon Company for the administration of defendant's assets as an insolvent. From a decree postponing the claim of Cushwa & Bro. under the mechanic's lien to a trust deed, they appeal

Reversed.

FAULKNER & WALKER, for appellants.

W. H. TRAVERS, M. T. INGLES, A. C. NADENBOUSCH, and U. S. G. PITZER, for appellees.

ENGLISH, JUDGE :

On the 10th day of February, 1897, the Improvement, Loan and Building Association of Martinsburg, a corporation under the laws of the State of West Virginia, A. C. Nadenbousch, trustee, and Harvey T. Cushwa and Harry S. Cushwa, partners trading under the firm name of H. T. Cushwa & Bro., appeared in open court in the circuit court of Berkeley County, and filed their bill in chancery against the Auburn Wagon Company, a corporation, U. S. G. Pitzer, trustee, and others, in which, among other things, they alleged that on February, 18, 1896, the defendant the Auburn Wagon Company, a corporation under the laws of Pennsylvania, and a citizen of said state, was the owner in fee of a lot of ground in the town of Martinsburg, Berkeley County, W. Va., containing two acres, three rods, and ten poles, and on that date executed a deed of trust to said Nadenbousch, trustee, on said lot,

together with all improvements then on same, or thereafter to be put thereon, etc., a copy of which trust deed was exhibited with said bill, from which it appears that said deed was made for the purpose of securing the payment of an indebtedness of forty thousand dollars with interest, to said Improvement, Loan and Building Association, owed by said Auburn Wagon Company, which was payable in installments as therein set forth, and upon terms and conditions therein set forth. On February 13, 1897, said building and loan association gave notice to said Nadenbousch, trustee, to proceed to execute said deed of trust by selling the property thereby conveyed in the terms required by said deed. It was further, alleged that on October 13, 1896, said firm of H. T. Cushwa & Bro. filed their mechanic's lien in the office of the clerk of the county court of Berkeley, wherein the real estate owned by said Auburn Wagon Company, above described, is situated; that is to say, they filed a just and true account of the amount due them, after allowing all credits, together with a description of the property owned by said wagon company, and intended to be covered by the lien claimed by said H. T. Cushwa & Bro., sufficiently accurate for identification, duly sworn to by said Harry S. Cushwa, an office copy of which was exhibited with plaintiffs' bill, as Exhibit B. The bill also alleged that there was due to said H. T. Cushwa & Bro. on account of said lien the sum of three thousand eight hundred and eighty-eight dollars and forty cents, with interest; that the same was for work and labor performed and materials furnished in constructing the buildings of the plant of the said Auburn Wagon Company on lot aforesaid; that said work was performed and materials furnished partly under a contract in writing made by said Cushwa & Bro. with said wagon company; that said work and labor were performed and said materials furnished between the 24th of February, 1896 and 1st of September, same year; and that no part of the amount due them as shown by said Exhibit B has been paid, but the same is wholly due, with interest thereon. It was further alleged that on December 3, 1896, the Auburn Wagon Company executed a deed to U. S. G. Pitzer, trustee for the Morrison & Westfall Company of said real estate, with

other property therein described, to secure to said Morrison & Westfall Company the payment of certain drafts, notes and indebtedness, a copy of which trust deed was also exhibited as part of the bill. The plaintiffs in their bill also described several judgments which had been obtained by other parties, who were made defendants, against said Auburn Wagon Company, before a justice of the peace of Berkeley County. Plaintiffs also alleged that said wagon company was wholly insolvent; that its liabilities exceeded one hundred thousand dollars; that the assets consisted almost exclusively of the real estate above mentioned, with the improvements thereon, and machines and tools used in the business of manufacturing wagons, the total value of which was not more than enough, if properly administered, to pay the indebtedness due plaintiff, said Improvement, Loan and Building Association; that said wagon company has in process of manufacture, and almost ready for shipment, a large number of wagons, to-wit: eight hundred, but which cannot be completed and placed on the market, for want of additional material to complete the same, which, owing to its crippled financial condition, it was unable to secure; and the plaintiffs prayed the appointment of a receiver to take charge of the property and business of said company, and operate the same, until such time as a sale can be properly made thereof, or until the court should otherwise order; that the creditors of the company might be convened by a reference of the cause to a commissioner, and that the respective amounts and priorities of their liens and debts might be ascertained, and the assets of the company properly distributed among them. The defendant wagon company answered the plaintiffs' bill, admitting the execution of the deed of trust to A. C. Nadenbousch, trustee, mentioned in the bill, and alleged that previous to the making of said conveyance the building and loan association had entered into a contract with it, bearing date December 10, 1895, which was not sealed and delivered until the 28th day of January, 1896, but possession of the property to said wagon company had been delivered some time prior to January 13, 1896, whereby said building and loan association agreed to loan said company forty thousand dollars, to be paid at the time and

in the manner therein set forth, and the said wagon company, among other things, thereby agreed that it would make and acknowledge for record a proper deed of trust upon said lot of ground, and upon all its buildings, plant, and machinery, to secure the party of the first part the loan aforesaid, and the performance of, all and singular, the covenants and agreements therein contained, and keep said property insured in some solvent company, which agreement was signed by H. T. Cushwa, president of the Improvement, Loan and Building Association, and F. C. Ward, president of the Auburn Wagon Company, acknowledged by H. T. Cushwa, president, on January 17, 1896, and by F. C. Ward, president, on January 28, 1896, and was admitted to record on March 13, 1896. The wagon company further answering, said that it had a contract with H. T. Cushwa & Bro. by which certain buildings were erected and materials therefor furnished by said Cushwa & Bro., and that on August 15, 1896, it had a settlement, through its president, F. C. Ward, with said Cushwa & Bro., and then gave to them three negotiable promissory notes of the said wagon company, each for the sum of one thousand one hundred and sixty dollars and thirty-one cents, making the aggregate, three thousand four hundred and eighty dollars and ninety-three cents, which notes were given by respondent as payment and satisfaction, and received by H. T. Cushwa & Bro. in payment in full, of the balance owing to said firm under that contract, and the extra work done for it by them, except a small part thereof, to-wit: the execution of what was called the "Mailing Office," which was to cost four hundred and seven dollars and forty-seven cents, taking said Cushwa & Bro.'s receipt therefor, which was filed as an exhibit in the cause. The respondent also denied that said Cushwa & Bro. on October 13, 1896, filed their mechanic's lien in the office of the clerk of the county court of said county (that is to say, a just and true account of the amount due them after allowing all credits), but on the contrary, it is alleged that the account filed by them was a false one, in which payment of said three thousand four hundred and eighty dollars and ninety-three cents as aforesaid was entirely omitted; and respondent denied that said Cushwa & Bro. had any

mechanic's lien whatever on respondent's property, and claimed that said false and fraudulent account filed by them failed to preserve a lien for any sum whatever. On February 16, 1897, a receiver was appointed of all the property of said wagon company, to take immediate possession of said property, and hold the same, as an officer of the court, under its orders and directions. On March 6, 1897, the cause was referred to a commissioner in chancery, with instructions to ascertain and report the debts owed by said wagon company, their respective amounts and priorities, and if, in so doing, he should find that the deed of trust by said wagon company to U. S. G. Pitzer, trustee, dated December 3, 1896, was made at such time as said wagon company was insolvent, then, in ascertaining such priorities, he should treat such deed as void as to the preference therein given, and as a general assignment for the benefit of all the creditors of said wagon company who should assert their claims in the manner prescribed by statute in existence at the time, ratably; also, to report the real estate and personal property owned by said wagon company, and what has been acquired, if anything, by said company, since the making of the deed of December 3, 1896, to Pitzer, trustee. On September 13, 1897, the commissioner filed his report, ascertaining the debt due H. T. Cushwa & Bro., evidenced by a mechanic's lien, amounting to four thousand one hundred and two dollars and ninety-one cents, principal and interest, as of September 14, 1897, to be the first lien upon the real estate owned by the Auburn Wagon Company; a debt due the Loan and Building Association, evidenced by a deed of trust executed to A. C. Nadenbousch, trustee, amounting to thirty-seven thousand, four hundred and ninety-seven dollars, principal and interest, as of September 14, 1897, to be the second lien upon said real estate; a debt due the employes of said wagon company for labor performed, amounting, principal and interest, as of September 14, 1897, to one thousand three hundred and sixty-one dollars and sixteen cents, to be the first lien upon the personal assets of said wagon company; and all debts proven, as due the general creditors of said wagon company, amounting, principal and interest, of September 14, 1897, to one hundred and thirteen thou-

sand nine hundred and twenty-four dollars and ninety-seven cents, to be a second lien on said personal assets; and that the personal property of said wagon company, when it went into liquidation, was sold by the receiver for six thousand two hundred and fifty dollars, which was then in the hands of the receiver, subject to the order of the court.

The Auburn Wagon Company excepted to the commissioner's report so far as it audited as a first lien on its property the claim of said Cushwa & Bro. for the sum of four thousand one hundred and two dollars and ninety-one cents: (1) Because the testimony shows that said wagon company on the 15th of August, 1896, made a settlement with said Cushwa & Bro., in which it gave to them its three negotiable notes each for the sum of one thousand one hundred and sixty dollars and thirty-one cents (in all, three thousand four hundred and eighty dollars and ninety-three cents), which were accepted by said firm in full payment of said claim, and full discharge of the contract under which the said claim arose, except as to the mailing office mentioned in said agreement, to be supplied by the said claimant for the sum of four hundred and seven dollars and forty-seven cents. (2) Because the pleadings and testimony show that, prior to the time the said claimant furnished any work or materials for the improvements upon which the said mechanic's lien set up is founded, the said claimants had notice of a contract in writing of the wagon company with the loan and building association whereby the said association agreed to advance the sum of money mentioned in the bill, in the manner therein stated, and which are audited as a second lien on said wagon company's property, and also the agreement evidenced by the said contract to secure the payment of the said sums of money in the manner set out in said bill, and audited as aforesaid, by deed of trust on said property, which should be a first lien thereon. Depositions were taken and filed, and a decree was rendered on the 9th of November, 1897, sustaining the exception of said wagon company to said commissioner's report, so far as it held the mechanic's lien claimed by H. T. Cushwa & Bro. amounting to four thousand one hundred and two dollars and ninety-one

cents, to be the first lien against said real estate, and holding that it should have been audited as a general debt of the Auburn Wagon Company, but overruling said second exception, from which decree H. T. Cushwa & Bro. obtained this appeal.

Counsel for the appellees claim that the appellants acquired no mechanic's lien, for the reason that during the progress of the work payments were made on account of said wagon company to H. T. Cushwa & Bro. by the loan and building association, through H. T. Cushwa, its president, by his checks as such, and on the completion of the contract a settlement was made between said wagon company and appellants, and an ascertained balance of three thousand four hundred and eighty dollars and ninety-three cents was settled "in full for contract and extras, except mailing office," by the acceptance of three negotiable notes, each for one thousand one hundred and sixty dollars and thirty-one cents, executed on the 15th of August, 1896, by the Auburn Wagon Company, payable to H. T. Cushwa & Bro., four, five, and six months, respectively, from their date. Now, while it is true said notes were executed as above stated, and a receipt given on the same day in the following words: "Received of Auburn Wagon Company, Martinsburg, W. Va., three thousand four hundred and eighty dollars and ninety-three cents, (\$3,480.93), for bill August 13, in full for contract and extras, except mailing office. [Signed] H. T. Cushwa & Bro."—yet this receipt was merely *prima facie* evidence of the fact therein stated. Upon this question we find the law thus laid down in 1 Greenl. Ev. (15th Ed.) s. 305: "In regard to receipts, it is to be noted that they may be either mere acknowledgments of payment or delivery, or they may also contain a contract to do something to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely *prima facie* evidence of the fact and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony." So, also, 2 Tayl. Ev. s. 1124, say: "Therefore, except in some few special cases, a receipt, so far as it as a mere admission, is not conclusive evidence of the payment therein acknowledged, but the party signing it may

invalidate it by oral evidence of fraud, or of mistake or surprise on his part; for the document amounts only to *prima facie* proof, and is capable of being explained." To the same effect, see 19 Am. & Eng. Enc. Law, p. 1120, and authorities there cited. Bish. Cont. s. 176, says: "In general, receipts of payment, whether embodied in written instruments or not, are deemed to be of the imperfect sort, which, though *prima facie* evidence of what they declare, may be explained or contradicted orally. They are so even when expressed to be in full of all demands;" citing several authorities in note. When we look to the evidence in explanation of this receipt, it appears that the Auburn Wagon Company, instead of having paid said Cushwa & Bro. three thousand four hundred and eighty dollars and ninety-three cents in full for contract and extras, except mailing office, executed to them its three notes, bearing date August 15, 1896 (the same date as said receipt), for one thousand one hundred and sixty dollars and thirty-one cents each, payable, respectively, in four, five and six months after date to the order of H. T. Cushwa & Bro., at the Citizen's National Bank of Martinsburg, W. Va., which notes were still held by said Cushwa & Bro., at the time the account was taken in this cause, and were filed before said commissioner by H. T. Cushwa, with his deposition. Now, what was the effect of executing these three negotiable notes, which do not appear to have been discounted or used in any manner by the payees, but remain in their possession? Can they be regarded as a payment and extinguishment of the debt they represent? In the case of *Bank v. Good*, 21 W. Va. 495, SNYDER, JUDGE, delivering the opinion of the Court, said: "It is well settled in both Virginia and this State that a note will not be regarded as an absolute extinguishment or payment of a precedent note or pre-existing debt, unless it be so expressly agreed, whether the note received was that of one previously bound, or of a stranger;" citing *Poolc v. Rice*, 9 W. Va. 73; *Lazier v. Nevin*, 3 W. Va. 622; *Miller v. Miller*, 8 W. Va. 550. See, also, *Dunlap's Ex'r v. Shanklin*, 10 W. Va. 662, where it is held that: "Giving a receipt or taking a note with security from the purchaser, or taking the note of a third party, specifying in either case that it is

for the purchase money, will not, while the title remains in the vendor, be an extinguishment of the vendor's lien, unless the purchase money has been actually paid,
 * * * Taking a note from a debtor, or a note of a third party, is no discharge of the debt, unless it is expressly agreed between the creditor and debtor that it is an absolute payment thereof. * * * A receipt may be explained or contradicted by parol evidence." Now, it clearly appears by the evidence that although the receipt dated August 15, 1896, signed by H. T. Cushwa & Bro., acknowledged that they had received of the Auburn Wagon Company, three thousand four hundred and eighty dollars and ninety-three cents for bill of August 13th, in full for contract and extras, except mailing office, said amount was not in fact paid, but that the three notes above mentioned were executed for the same. The account of H. T. Cushwa & Bro. appears to have been filed with the clerk of the county court of Berkeley, and sworn to, on the 14th of October, 1896, and the last of said notes executed by the wagon company to Cushwa & Bro, became due on February 13, 1897, and suit to enforce said mechanic's lien might be brought, under the statute, until the 13th of April 1897; and it has been held that, though a note is payable after the expiration of the time limited by law in which a lien must be filed, it is not waived, if it be payable before the time in which the action must be brought for its enforcement, for a mechanic is allowed to file the lien before his note is due. In the case of *Ashdown v. Woods*, 31 Mo. 465, it is held that "the acceptance of the notes of the debtor, payable after the time granted by the statute for filing a mechanic's lien, and maturing before the expiration of the time limited, for bringing suit, will not bar a suit and recovery upon the lien, if the notes are produced to be surrendered at the trial." See, also, *McMurray v. Taylor*, 30 Mo. 263; also, *Schmidt v. Gilson*, 14 Wis. 514, in which it is held that "a mechanic does not lose his lien under the statute for work done upon a building by taking the note of the owner of the building, payable within the time allowed by law for commencing an action to enforce the lien"; and in *Goble v. Gale*, 7 Blackf. 218, it was held that "a mechanic's lien for work done is not waived by taking

his employer's note for the money due for the work, and giving a receipt in full for such money, the note not being paid."

It is contended that the debt due or to become due to the Improvement, Loan and Building Association, secured by the trust deed, for thirty-seven thousand four hundred and ninety-seven dollars was entitled to priority over said mechanic's lien. Is this position correct? In considering this question, we notice first the fact that on February 18, 1896, a written contract was entered into between the Auburn Wagon Company and H. T. Cushwa & Bro., with elaborate specifications thereto annexed, for the erection of certain buildings on its lots in the town of Martinsburg, in accordance with said specifications, with certain minor exceptions, for the sum of twenty-one thousand nine hundred and fifty dollars, which exceptions were to be paid for as extras, which was, and must be considered, an entire contract. It is shown by the testimony that H. T. Cushwa & Bro. began the work under this contract on February 10, 1896, and completed it September 4, 1896. The work was pushed right along, and said Cushwa, when asked what amount of work and material in money was done and furnished prior to March 9, 1896, answered that they were excavating and building the foundation during that time, which was a part of the contract. The deed of trust in favor of the building association above mentioned was admitted to record in Berkeley County on the 9th of March, 1896. Did the fact that this trust deed was executed and recorded after the appellants had commenced work under said contract entitle said trust deed to priority over said mechanic's lien? If such be the case, the mechanic's lien law affords very little protection to the contractor in this State, since the party who employs him to erect buildings upon his lands can defeat his lien, when the work is almost completed, by executing a deed of trust on the property. The right to execute and record such trust deed one day or one month, as in this case, after the work has commenced under the contract, implies the right to create such trust deed, and take priority over the mechanic's lien, at any time while the work is in process of completion. Our statute (Code, p. 652, s. 2) provides that every mechanic, etc., who shall perform any work or fur-

nish any material, etc., shall have a lien to secure the payment of his contract, upon such house or other structure, and the lien authorized by this section shall have priority over any other lien created by deed or otherwise on such house or structure subsequent to the time when such labor shall have been performed or material furnished. Cushwa & Bro. were proceeding with their contract. The wagon company had notice that they were performing it, and that every day's work in pursuance of the contract entitled them to a lien for their services. Would it be a fair construction of the statute to hold that said wagon company, by executing said trust subsequent to the time one month's labor had been performed under the contract, would give the *cestui que trust* priority over said mechanic's lien? I think not: and it is certain that few contractors would rely for protection on the mechanic's lien, in this State, if such was the proper construction. It surely never was the intention of the Legislature that a contractor should have no right to a mechanic's lien for work and material furnished until after he completed his contract. In the case of *Building Co. v. Saucer*, 45 W. Va. 483 (31 S. E. 965)—BRANNON, PRESIDENT, delivering the opinion of the Court, said (speaking of the builder): "He may go on to work, and he has his lien from its commencement, or when he began furnishing material; and the statute gives him a lien over any other creditor whose liens arise after his lien commences, without any recordation, because the law gives notice to the world that the mechanic's lien attached to the building, which lien he may enforce by filing it sixty days after completion."

In the case of *Manufacturing Co. v. Brockmyer*, 18 W. Va. 591, GREEN, JUDGE, delivering the opinion of the Court, says: "The statute itself provides expressly that such lien shall have priority over every lien created by deed or otherwise on such house," etc., 'subsequent to the time when such labor shall be performed, and material furnished.' This would, it seem to me, by its clear language, give a lien from the time when the labor commenced on the buildings, or the material commenced being furnished, though, by the third section, thirty days after the labor ceased, or the material has ceased to be furnished,

are given in which to record the lien. Thus for a time it is a secret lien. The mechanic's lien, under our statute, begins from the day when the work is begun, according to what I think is its proper meaning." See, also, *Dunklee v. Crane*, 103 Mass. 470.

Now, as between the Auburn Wagon Company and Cushwa & Bro., the mechanic's lien of the latter surely attached from the time they commenced performing the contract, and after that said wagon company could only convey the property to a trustee subject to the mechanic's lien, as they could only convey the property as they held it. In 15 Am. & Eng. Enc. Law, p. 191, it is said: "Mechanic's and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others who have acquired interests in the property, must furnish strict proof of all that is essential to the creation of the lien; and this rule requires them to prove when the work was commenced, the character of the work, and when it was completed;" citing *Bank v. Winslow*, 3 Minn. 87, (Gil. 43) and *Davis v. Alvord*, 94 U. S. 545, in which last named case Justice Field, speaking of the mechanic's lien law, says; "The statute was designed to give security to those who, by their labor, skill, and materials, add value to the property by a pledge of the interest of their employer for their payment; and for that purpose it subordinates all other interests acquired subsequent to the commencement of their work, although no notice that a lien may even be claimed is required, except within sixty days after the work is completed." See *Bank v. Dashiell*, 25 Grat. 616.

It is clearly shown in this case that the work was commenced under this contract more than a week before the deed of trust was recorded. By commencing the work, Cushwa & Bro. acquired a vested right, which could not be overthrown or superseded by said deed of trust. To hold otherwise would be to hold that a deed of trust executed and recorded one day before the work was completed would take priority over the contractor's entire claim. I therefore hold that our statute must be construed to intend that the lien attaches when the performance of the work commences. In view of the authorities above cited,

and looking to the facts proved in the record, I am of opinion that the court erred in holding that the mechanic's lien claimed by H. T. Cushwa & Bro., four thousand one hundred and two dollars and ninety-one cents, was not properly audited as a mechanic's lien, and that it should have been audited as a general debt of said wagon company, and sustaining the first exception taken by the Improvement, Loan and Building Association, and others to the commissioner's report, for the causes assigned in said exception. Said claim of Cushwa & Bro. should have been held as a mechanic's lien, to take its place as such, in point of priority, in the account reported by said commissioner. For these reasons the decree complained of must be reversed, and the cause remanded.

DENT, JUDGE, (*dissenting*):

I respectfully dissent from the majority of the Court in this case, for the reason that they hold, in effect, by point 5 of the syllabus, that the clause in section 2, chapter 75, of the Code, to-wit: "The liens authorized by this and the next preceeding section shall have priority over any lien created by deed or otherwise on such house or other structure and the lots on which the same are erected subsequently to the time when such labor shall have been performed or material or machinery furnished," is equivalent to the words, "The lien created by this act shall be preferred to every other lien or incumbrance which shall have attached upon said property subsequent to the time at which the work was commenced or the material furnished, and no incumbrance upon the land created after the making of the contract for the erection of a building upon such land shall operate upon the building erected until the lien in favor of persons doing the work or furnishing the materials shall have been satisfied," contained in the statutes of Virginia, Minnesota, and Montana, and I might add Missouri, New Jersey, Maryland, and Connecticut, and other states and territories having similar provisions to the Virginia statute. Some states begin the lien from the making of the contract. *Bell v. Cooper*, 26 Miss., 650. Statutes have changed from time to time in

the different states, so that the decisions thereunder vary accordingly. But this is the first case that I have been able to find that holds that the words "shall have performed" mean "commenced." Nor can any such definition be found in the dictionaries or law books. The Court seems to place the misuse of the word "performed" on the legislature. The presumption is against the assumption of such legislative ignorance, and the law says that words used in a statute must be given their common and ordinary meaning, unless the contrary plainly appears from the context. To do otherwise is to legislate, and not to construe. In this case the Court has manifestly exceeded its judicial powers, and amended the statute so as to make it read, "when such labor shall have been commenced," instead of, "when such labor shall have been performed." The authority under which the Court justifies itself in doing this is from those tribunals where the governing statutes use the word "commenced," and not the word "performed," to-wit, Virginia (*Bank v. Dashiell*, 25 Grat. 616), and Montana (*Davis v. Alword*, 94 U. S. 545), and the mere dictum of JUDGE BRANNON, in the case of *Building Co. v. Saucer*, 45 W. Va. 483, (31 S. E. 965), not supported by any authority, except a general reference to section 215, Phil. Mech. Liens, and not necessarily involved in a decision of that case. It is hard to conceive why reference was not made to authorities from Massachusetts, Missouri, New Jersey, Connecticut, Maryland, District of Columbia, and various other states where the statutes use the word "commenced," instead of the word "performed," unless the court grew tired of the subject, or considered the last authority quoted as of such binding and unimpeachable conclusiveness—a *ne plus ultra*—that it would be a matter of wasted labor to look any further. In Phil. Mech. Liens, s. 215, it is said: "The time when the lien is to be considered as acquitted depends essentially upon the provisions of the law authorizing this remedy. * * * The period fixed has not been uniform in the several states. The larger number have established [this is by statute, and not by decision of court] the commencement of the work upon the premises as the moment when the rights of the mechanic are to be protected; others have made the

filing of a notice, in some public office of the jurisdiction where the building is situate, of intention to hold a lien, the time when it will attach; while a few have adopted the date of contract or the completion of the work." Looking for the true definition of the word "performed," we find it means "completed, furnished or finished," but never "commenced." So our State really belongs to the last class above mentioned, as to the priority of mechanic's liens and those created by deed or otherwise. In 15 Am. & Eng. Enc. Law, p. 80, it is said: "The time when a mechanic's lien is acquired depends upon the provisions of the law authorizing the remedy;" and on page 88, "The rights of a mortgagee are paramount to those of the mechanic, where the mortgage attaches before the house was erected, altered, or repaired;" and page 91, "Where the lien attaches when the structure is completed, a mortgage executed after the commencement and before the completion of the work is paramount to the lien." In the case of *Williams v. Chapman*, 17 Ill. 423, in construing a somewhat similar statute, it was held: "The mechanic's lien will attach from the delivery of the materials upon the premises, and the use of them by connecting them to the freehold, not from the date of the contract." Scates, C. J., in his opinion, on page 425, says: "In *McLagan v. Brown*, 11 Ill. 526, it was held that the lien under this statute will attach and commence upon the performance of the work or delivery of the materials. The same principle is, in effect, asserted, and the reason for it alluded to, in the case of *Gaty v. Casey*, 15 Ill. 192, where in answer to an objection to a contract made in St. Louis having an extraterritorial effect to create a real estate lien in Illinois, the court said: "It is not the contract which creates the lien under the statute, but it is the use of the materials furnished upon the premises, the putting them into the building and attaching them to the freehold, which entitles the party furnishing materials to a lien upon the premises to extent of their value." * * * This is the most equitable construction, if the rights of others are to be regarded. While we will give the act a liberal interpretation, to preserve the rights of mechanics and material men, we are not called upon to destroy all other rights in order to foster and give efficien-

cy to every claim and assertion of this secret incumbrance. By the delivery of material, or the bestowal of labor upon the land means are offered others to know something of such claims for the eighteen months that may follow within which the right must be asserted. Were the promise or contract for the material or labor the ground of lien, or even the bare commencement to deliver the one or bestow the other, no one could possibly have any means of knowledge, and the time of completion and payment might prolong this uncertainty for years. We think the lien put upon the right and reasonable ground,—the existence of a debt; for the one or the other by performance of the benefit contracted for the land, and it is immaterial whether that debt be due or not.” The lien, under our statute, is not given by reason of the contract, but because and for labor performed and material furnished, and hence cannot attach to the property until the labor is performed and the material furnished, goes, into and becomes a fixed part of, the realty. As long as it is not a part of the realty, no lien attaches by reason thereof. Such was the holding of the supreme court of Arkansas, under a precisely similar statute, except that the reservation now under discussion was not contained in the Arkansas statute; and yet the court reached the conclusion in perfect accord with this reservation, while the court with much plausibility could have arrived at the same conclusion our Court now arrives at, for the very same reason that this reservation which is in our statute was not in the one under construction. *McCullough v. Caldwell*, 5 Ark. 237. In that case it was held by the court: “The lien of a mechanic for work and labor or materials furnished commences with the completion of the work and delivery of the materials under the contract with the proprietor.”

Section 2, chapter 75, Code, provides, in its first clause, that “every mechanic, builder, artisan, workman, laborer, or other person who shall perform any work or labor upon or furnish any material or machinery for constructing, altering, repairing or removing a house, mill, manufactory or buildings, appurtenances, fixtures, bridge or other structure, by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment

of the same, upon such house or other structure and upon the interest of the owner in the lot of land on which the same may stand or to which it may be removed." This clause, standing alone, could not be construed otherwise than that the lien was to attach to the property only after the labor was performed or the materials furnished; for it attaches by reason of the performance of the labor and the furnishing of the material, and is in its nature a purchase-money or vendor's lien, and follows the labor and material into the property. The affixing the one fixes the other. "The lien attaches, and the right to enforce it accrues, at the completion of the contract, and when the labor has been fully performed." *Cummings v. Wright*, 72 Ga. 767. To render this emphatic, and place it beyond question, our statute then provides for the priority of the mechanic's lien over any lien created by deed or otherwise, "subsequently to the time when such labor shall have been performed or material or machinery furnished." Here the time is fixed, and the past perfect tense is used, denoting completion; yet this Court says these words mean subsequent to the time when such labor shall have commenced. Verily, the power of construction is great, when the statute can be made to mean just the opposite from what it says. There is neither end nor beginning. Both are ends, and it is possible to be at both ends at the same time. If such construction be correct, how useless it was for the statutes of Virginia, Minnesota, Montana, and other states to provide "that the lien created by this act shall be preferred to every other lien or incumbrance which shall have attached upon said property subsequent to the time at which the work was commenced." The legislature meant just what it said,—that the lien should attach from the time the work shall have been performed, or, in short, completed. The law does not give notice to the world that the mechanic's lien attaches until the labor be performed or the material or machinery be furnished. What labor the mechanic may have done, or the material or machinery he may have furnished, the law gives notice of, but not what he is to do or furnish. The idea that the mere working on a foundation, getting out stone, being notice that an immense factory was to be built by those doing this work, is entire-

ly too broad. "The fact that some of the appellants were at work on the property and material being furnished by others at the time the mortgage was executed was not actual notice of the existence of the lien. It was notice that the property was being repaired, but gave no evidence to the purchaser of the nature of the contract between the employer or the employes, or that the money for the labor and materials furnished was unpaid. It is the lien the purchaser must have notice of, and not the fact that the property is being improved." *Foushee v. Grigsby*, 12 Bush. 75.

In the present case the Improvement, Loan and Building Company had a prior equitable lien on the property involved, of which Cushwa & Bro. had actual notice, the object of such lien being for the purpose of securing money to pay for building on the property. With full knowledge of such lien, Cushwa & Brother contracted to put up such buildings, and this lien is referred to, and certain provisions made in relation thereto in the contract. They did a small amount of work in getting out stone for the foundation, when, on the 9th of March, 1896, the prior equitable lien became effective by recordation. They went on and completed their contract by the 1st of September. It amounted, including extra work, to twenty-two thousand nine hundred and eighteen dollars and ninety-five cents, on which they received, presumably out of the money furnished by the improvement company, nineteen thousand and thirty dollars and fifty-three cents, leaving a balance unpaid, which was really not due until the 1st of August, of three thousand eight hundred and eighty-eight dollars and forty cents, and which, with interest added, will probably eat up the whole sum for which the lot and buildings sold, and leave nothing to be applied on the large debt of nearly forty thousand dollars due and coming to the improvement company; and this Court, in giving a strained and unwarranted construction to the statute, permits this to be done, although plainly unjust and inequitable. The only excuse given for this is that the rights of the mechanic must be protected, although subsequent, both in equity and in law, to the person who furnishes the money, without which no building could have been built, or

no building contract entered into. There is no injustice done to the mechanic in limiting this law to its true meaning as indicated by the language used. The mechanic gets his lien when the labor is performed and the material furnished, and as it is performed and furnished, and the *bona fide* mortgagee gets his lien from the time the mechanic has notice thereof; so that the mechanic need not perform further labor, or furnish further material, unless he wishes to, in subjection to the trust lien. But it is said this may defeat his contract. That may be true. The object of the statute was not to preserve his contract, or give him a lien therefor, or clothe him by reason thereof with a vested interest in the property; but it was simply to provide a lien for him on the property for the actual work performed or material furnished, subject, however, to any lien on the property of which he has notice at the time he performs the work or furnishes the material. It is said judgment and other liens would intervent and interfere with, if not destroy, his contract, and he would be prevented from carrying the same out. It is just as well that he should lose his contract, when he saves his labor and material, as that other lienors, who might be just as needy as he, should lose their debts. It is said that liens might attach of which he had none but constructive notice, and, if he went on and completed his contract, he would lose his labor and material, by reason of no fault of his, as he could not watch the records to see what might thereon be recorded. A court of equity would treat his lien as a purchase-money lien, to the extent of the labor and material furnished, and prior to any lien acquired during the performance of his contract, of which he had not actual notice. Such secret liens would be subject to the same rule which takes land from the true owner thereof, who stands by and suffers a mechanic to go ahead and do work thereon under the belief that it belongs to some one else. 15 Am. & Eng. Enc. Law, p. 65; *Coleman v. Goodnow*, 36 Minn. 9, (29 N.W. 338); *Donaldson v. Holmes*, 23 Ill. 85; *Higgins v. Ferguson*, 14 Ill. 269; *Hulsman v. Whitman*, 109 Mass. 411. A judgment lien is always limited to the interest of the judgment lien debtor in the property, while a trust lienor could not stand by and allow another, ignorant of his holding, to bestow

labor and material on the trust subject, unless such trust was either prior to any rights the mechanic may have in the property, or he have actual notice thereof at the time the labor is performed or material furnished, for the giving of such secret trust would be a fraud against the mechanic. And a court of equity will apportion the property between the mechanic and mortgagee, *Preston v. Senora Lodge*, 39 Cal. 116; *Butler v. Thompson*, (W. Va.) 31 S.E. 960, and *Lawyer v. Barker*, *Id.* 964, decided at this term. It said that the mechanic's lien would be broken into intervening liens, and the matter would be hard of adjustment. Nothing is too hard for a court of equity to adjust so as to clothe each party seeking its aid with his true equitable rights. It fails only when its administrators prove unequal to the task it imposes upon them, and the trust and confidence it reposes in them. Equity, law, and right are on the side of the improvement company in this controversy, and yet it fails of justice for the reason that a majority of the Court construes the words "shall have performed" to mean "commenced," instead of "completed."

In the amendment of the Court's opinion in this case since the rehearing was applied for, attention is, with some degree of exultation, directed to the dictum of JUDGE GREEN, in the case of *Manufacturing Co. v. Brockmyer*, 18 W. Va. 591, in which he says, in commenting on a similar statute: "This would, it seems to me, by its clear language, give a lien from the time when the labor commenced on the buildings, or the material commenced being furnished, though, by the third section, thirty days after the labor ceased or the material has ceased to be furnished are given within which to record the lien. Thus for a time it is a secret lien. The mechanic's lien begins from the day the work is begun, according to what I think is its plain meaning. Similar statutes have been generally so construed. See *Wells v. Canton Co.*, 3 Md. 234." It is undoubtedly true that the lien begins when the work commences but it only extends so as to cover the work and labor actually performed and material furnished, and as performed and furnished, and does not extend to cover the whole contract in advance of its performance. If this is the meaning of JUDGE GREEN—and his language plainly

allows such construction—then he was right, and the construction of his language by the Court is wrong. If, however, the Court is right in its construction, then undoubtedly JUDGE GREEN dropped into the same error as his learned successor in the *Suucer Case*. The only authority relied on by him (being *Wells v. Canton Co.* cited) clearly shows this, as this was a decision under a Maryland statute (Laws 1838. c. 205), dissimilar to ours, in that it by its terms gave a lien to the mechanic from the commencement of his work for the whole work and material furnished. Judge Eccleston, in his opinion, says: "The ninth section of which [meaning the statute], and the first section of the second act [Laws 1845, c. 176], give preference to liens on buildings for work and materials over all liens or incumbrances attaching subsequently to the commencement of the buildings"—being directly contrary to the provision in our statute. This plainly illustrates the many errors that creep into judicial decisions by the hasty, inconsiderate, and ill-advised dictums of judges on points not necessary for them to determine; but which afterwards become traps for the unwary, and form a foundation of future erroneous decisions, to the destruction of the logical harmony of our system of common-law jurisprudence, and the denial of justice and the perpetration of wrong. And such dictum, when once launched, continues on its chaotic course until some succeeding court, by a recurrence to fundamental principles, stays its further progress by disapproving all decisions founded thereon. Year by year the number of overruled and disapproved cases is augmented, many of which might have been avoided, had their learned authors given the law as it is written, and not their opinions as to what it ought to be. It is the law that litigants want, and not the dictum of one judge founded on the dictum of some other judge. The I's and my's could be erased from all opinions without detriment thereto, except to record a dissent from palpable error, or they could be so plainly expressed as to show a mere opinion as to what the law should be, in opposition to what it really is. This would prevent them from being misleading from the mere fact of the learned source of their utterance. The Court, in its amended opinion, also refers to

the case of *Dunklee v. Crane*, 103 Mass. 470, as a case in point, wherein it is held that "a mechanic's lien, under Gen. St. c. 150, has priority over a mortgage executed after the making of a contract under which a lien is claimed under a statute which expressly provides that the mechanic shall have a lien from the date of his contract prior to any subsequent mortgage." It is useless to comment on such inapplicable authority. The Court had better confess that its decision has nothing to support it except its *obiter dictum* as to what the law should be, and not as it is written, than to base its conclusion on authorities that have no possible application. "Open confession is good for the soul." And no one who has access to the Reports is going to be misled by irrelevant references thereto.

There is another matter which detracts greatly from the equity of the conclusion reached in this case. H. T. Cushwa, one of the members of the firm of Cushwa & Bro., was president of the Improvement, Loan and Building Association on the 10th day of December, 1895, and as such president he entered into and signed a contract with T. C. Wood; president of the Auburn Wagon Company, which contract was acknowledged by said Cushwa on the 17th day of January, 1896, and by which the said building association agreed to loan said wagon company the sum of forty thousand dollars, to secure which the deed of trust in controversy was afterwards given and recorded. This contract was also recorded on the 13th day of March, 1896, before any considerable proportion of the work had been done by Cushwa & Bro., on their contract, and the part for which they now claim a lien was not completed until months afterwards. This contract contains the following provision, to-wit: "The said party of the first part hereby covenants and agrees to and with the said party of the second part that it will loan to said party of the second part the sum of forty thousand dollars in installments as follow: Five thousand dollars on the 15th day of February, 1896, less the dues on said four hundred shares of stock from the 16th day of December, 1895, and the sum of one thousand dollars advanced by the said party of the first part to pay the purchase money to W. T. Stewart, guardian, etc., for the parcel of land in said city of Martinsburg, ly-

ing on the northwestern side of Race street, adjoining the right of way of the Cumberland Valley and Martinsburg Railroad Company, upon which the said party of the second part is to locate its plant; five thousand dollars on the 16th day of March, 1896; provided, however, that if, at the time the said two installments become payable, the work on the buildings to be erected for said plant shall not have progressed sufficiently to warrant the payment of such installment, then the time of the payment of the same shall be deferred until such time as the progress on said buildings shall so warrant, and all subsequent payments hereinafter set forth shall be made at regular intervals every thirty days thereafter: five thousand dollars April 16th, 1896; five thousand dollars May 16th, 1896; five thousand dollars June 16th, 1896; five thousand dollars July 16th, 1896; five thousand dollars August 15th, 1896; and five thousand dollars September 16th, 1896, the last six installments, however, being made subject to the conditions affecting the time of payment of the said first and second installments as above provided,"—thus showing a clear intention that the money loaned was to be used to pay for the buildings, and was not to be paid over until it was secured by the completion of the buildings as they progressed. By the building contract of H. T. Cushwa & Bro., the buildings were to be completed on the 1st of May 1896, at which time twenty-five thousand dollars of the loan would have remained in the control of the association; and if H. T. Cushwa, president of such association, had adhered to the provisions of the loan contract, no part of the twenty-five thousand dollars would have been paid over until the buildings were completed, but, because his firm was behind on the contract, he authorized the association funds to be paid over, in violation of the condition on which it was loaned, to be used for other purposes than payment for the buildings. The last installment was not to be paid until the 16th of September, 1896, which was four months after the buildings were stipulated to be completed, one month after H. T. Cushwa & Bro. settled with the wagon company, and accepted its negotiable notes, payable four, five, and six months after date, to-wit: August 15, 1896, and fifteen days after they finally completed the

work for which they claim a mechanic's lien; and yet the said H. T. Cushwa concealed from the association, of which he was still the president, the fact that his firm was going to file and claim a mechanic's lien, and actually allowed and joined in paying, as such president, to said Auburn Wagon Company, said installment of five thousand dollars, which should have been applied to the payment of the amount of such mechanic's lien. By accepting the deferred notes of the company, he placed it out of the firm's power to sue until they were due, concealed the fact of the claim from the association, and led the other officers thereof to believe that it had been satisfied, and then, as president of said association, authorized the payment of the last installment to the company. This is certainly a breach of trust, for which, if the mechanic's lien were coming to him individually, it would justify the court in postponing it, if prior in right, to the trust deed of the association. Not only this, but as president of the association, he neglected to have the trust deed or contract on record until after his firm had commenced work under their building contract, with full notice of such deed of trust and loan contract. He virtually had the money in his own hands which was intended to and should have gone to the extinguishment of the mechanic's lien; but, having extended credit to the company, he placed it out of the power of his firm to demand payment thereof, and allowed the money to be applied in fraud of the association, without giving it any notice, while he was its trusted executive officer. Its rights he gave away without its knowledge, but was careful to preserve his own. His acts and knowledge in the premises were the acts and knowledge of the firm. And when he authorized the money which was intended by the association to be used in payment for the firm's indebtedness to be paid to the wagon company, and allowed the same to be applied otherwise than to the extinguishment of the mechanic's lien, and accepted deferred negotiable notes in lieu of such money, he thereby bound his firm to the release of its prior right, if any it had, over the association trust lien. 17 Am. & Eng. Enc. Law, pp. 1038, 1069. The association trusted him with its business. The firm did likewise. The association never authorized him to permit the application of its

loan to the wagon company to be used for any purpose other than the extinguishment of the debt on its security until such debt was fully satisfied, as appears from the contract signed by him as its president ; yet, as a member of the firm, he had a right to release the firm's debt, postpone its payment, or to direct the funds applicable thereto to be applied otherwise in such manner as to completely bind the firm, but not to the injury or loss of the association. With both he must act honorably, and within the scope of his authority in his double capacity. His duty as president of the association was to see that its funds were applied to relieve its security from prior liens, and this duty he could not legally disregard, as he had no other alternative. His duty to his firm was to see that this money was applied on its indebtedness as soon as the work was completed. This duty he could legally disregard, postpone the indebtedness, and allow the money to be otherwise used, and thus bind the firm. This he did do, and the firm should be held bound by his action, and its lien should be postponed to the trust lien. This is both just and equitable. The innocent stockholders were made to suffer by the decree of the court, while he who had it in his power and should have protected their rights is rewarded for breach of the trust and confidence placed in him. He saved himself ; others he should, but would not, save. His gains, therefore, should have been used to cure their losses. The commencement of a duty is not the performance thereof, the court to the contrary notwithstanding, but, to be rightly performed, it must be fully completed ; and in this case this means that the loss should be rightly placed on the shoulders of that one of two parties whose conduct, innocent or fraudulent, occasioned it. This is an elementary principle of equity. The firm, through its agent, H. T. Cushwa, knowingly permitted the money intended to satisfy its lien to be otherwise disposed of and used, to the injury of the association ; and therefore, the firm should bear the loss, and not the association.

Reversed.

CHARLESTON.

HUNDLEY v. CALLOWAY.

Submitted June 18, 1898—Decided Dec. 7, 1898.

1. CHATTEL MORTGAGE.—*Removal of Property—Detinue.*

R. executes a deed of trust on two mules to H., trustee, to secure Y. in the sum of one hundred and sixty-five dollars. The deed is recorded in R. County, November 23, 1895, the day of its execution. The property is removed to C. County, and the deed recorded there December 5, 1895. The property is removed to F. County, and the deed recorded there November 28, 1896. On November 30, 1896, action is brought by H., trustee, in detinue, for the mules, before a justice, in F. County, against C., who is in possession. At the trial the deed of trust is given in evidence, mules identified, possession is proven with C., and that one hundred dollars on the trust lien is still due and unpaid. H., the trustee, has shown superior title, and is entitled to recover, unless C. shows that he purchased the mules without notice, and for valuable consideration, without C. and R. Counties, three months or more prior to the recordation of the deed. (p. 519)

2. CHATTEL MORTGAGE.—*Detinue—Damages—Judgment.*

In such case, if plaintiff establish his right to recover, the measure of his damages would be the amount proved to be due and unpaid on the trust lien, for which he should have alternate judgment against the purchaser. (p. 520).

Error to Circuit Court, Fayette County.

Detinue by G. W. Hundley, trustee, against A. N. Calloway. A judgment of a justice of the peace in favor of defendant was set aside by the circuit court on *certiorari*, and defendant brings error.

Affirmed.

ST. CLAIR, WALKER & DILLON, for plaintiff is error.

PAYNE & PAYNE, for defendant in error.

McWHORTER, JUDGE :

E. E. Runion conveyed by deed of trust, November 23, 1895, to G. W. Hundley, trustee, two mules, to secure to S. J. Young the payment of two notes, of sixty-five dollars and one hundred dollars respectively, which deed was recorded in Roane County on the day of its date. The property was removed to Calhoun County, and said deed there recorded December 19, 1895. On the 28th of November, 1896, it was recorded in Fayette County. Two days thereafter (November 30th), the trustee, G. W. Hundley, instituted his action in detinue before Justice A. C. Barton, in Fayette County, against A. N. Calloway, for the possession of the two mules, describing them, and alleging their value at one hundred and twelve dollars and fifty cents each, summons returnable on the 5th day of December, 1896, on which day defendant, by counsel, appeared only for the purpose of quashing the summons and the return thereon, and made such motion, which was overruled, to which ruling the defendant excepted. Defendant demanded a jury, which was summoned, impaneled, and sworn. Evidence was adduced by the plaintiff, who introduced the deed of trust, showing the recordation thereof in the three counties of Roane, Calhoun and Fayette, as above stated, to the introduction of which defendant objected. The objection was overruled, and defendant excepted. S. J. Young testified that there was still due him on his debt secured by trust deed, one hundred dollars, with thirteen and one-third months' interest, and identified the mules in possession of defendant as the same conveyed in the trust deed, and stated that, according to his best information, the mules were removed from Calhoun County about the 1st of October, 1896, and that Runion took them out of the county; that he supposed the property came into the possession of the defendant about the 17th of October; that the property was with the show, and it was advertised to be at Fayetteville the 17th of October, and he supposed the defendant traded for them; he had been told so. Defendant, by his counsel, moved to exclude the answers of the witness in relation to when the property came to Fayetteville, and when defendant traded for it,

which the court overruled, and the defendant objected and excepted. Witness further stated, by permission of the court, over the objection and exception of the defendant, that the defendant said to him he did not dispute their being the same mules. On cross-examination, witness said he could not give the date when he last saw the mules in Calhoun County; did not know of his knowledge the exact date of their leaving Calhoun County; said it had been pretty near a year since he (witness) had been in Calhoun County. Witness T. G. Walker testified on behalf of plaintiff, that the show was in Fayetteville in October; had seen the mules several times in defendant's possession since the show; never saw them in his possession before the show; and defendant told witness that he traded for them at that time. And this was all the evidence offered in the case. Defendant moved the court to strike out the evidence so offered, which motion was overruled; and defendant excepted to said ruling, and the jury returned a verdict for the defendant. Plaintiff moved to set aside the verdict, and grant him a new trial, for the reason that the verdict is contrary to the law and the evidence, which motion the justice overruled, and gave judgment for the defendant, to which ruling the plaintiff excepted. Plaintiff applied for, and secured from the circuit court of Fayette County a writ of *certiorari*.

On the 10th of March, defendant, by counsel, moved the court to quash the writ and return thereon, and the petition filed in the case, on the ground that the writ of *certiorari* was improvidently awarded, for the reason that the justice did not err in overruling plaintiff's motion to set aside the verdict of the jury, and in refusing to grant him a new trial, which motion the court overruled, and held there was error in the record judgment of the justice, and set aside the said judgment and verdict, and granted plaintiff a new trial, and retained the case in the said circuit court for trial; to which rulings of the court the defendant excepted, and tendered his bill of exceptions, which was duly signed and saved to him, and defendant obtained from this Court a writ of error and supersedeas, assigning as error that, "in order to make out his case, it was necessary to prove that not more than three months

had elapsed from the date of the removal of the property from the county of Calhoun or the county of Roane next preceding the institution of the suit, or that the conveyance thereof had been on record in the county of Fayette within that period. There is no proof in the record to show that the property in question was removed from the county of Calhoun or the county of Roane within three months prior to the institution of the suit, and this must appear affirmative before the action can be maintained, since the deed does not appear to have been recorded in Fayette County until the 28th of November, 1896. By the deed of trust, the property being fully identified upon the trial, the plaintiff clearly showed himself to have the superior title, and entitled to recover possession of the same, unless the defendant showed his right by having purchased the property for valuable consideration, without notice, and without Calhoun and Roane Counties, three months or more prior to the 28th of November, 1896, the date of the recordation of said deed. The defendant did not attempt to show that he had any right whatever. He may have simply borrowed the mules from Runion or was bailee of Runion, the owner.

Defendant contends that, unless it was shown that the trust deed was recorded in Fayette within the period of three months from the time the mules were removed from Calhoun, then the defendant was a purchaser without notice of the existence of said lien. He failed to show that he was a purchaser at all. It is also contended that plaintiff, not having proved the value of the mules, was not entitled to recover because of the provision of section 6, chapter 102, Code, that the verdict shall be for the possession of the property claimed, if it can be had; if not, that he recover the value thereof as found by the verdict. While the plaintiff did not prove the value of the mules, he did prove the exact amount of interest he had in them, which amount paid to him by the defendant, or real owner of the mules, would have entitled him to hold them free from said trust deed. The plaintiff only held the legal title to the mules for the benefit of Young, and only to the amount of his lien upon them, and their value to him would be limited to the amount yet unpaid on his lien, as in *Chamberlin v.*

Shaw, 18 Pick. 283, where Shaw, C. J., rendering the decision of the court, says: "If the case is so situated that the plaintiff can be indemnified by a sum of money less than the full value, there seems to be no reason why it should not be done, as where the plaintiff has a special property, subject to which the defendant is entitled to the goods. For instance, a factor has a lien on goods to half their value. The principal becomes bankrupt, and the property vests in his assignees, subject, of course, to all legal liens. The assignees, denying and intending to contest the factor's lien, get possession of the goods, and convert them. The factor brings trover, establishes his lien; and recovers. How shall damages be assessed? If hereafter the full value of the goods, he will be responsible directly back to the defendants themselves for a moiety of the value. To avoid circuity of action, why should not damages be assessed to the amount of his lien? He is fully indemnified. The balance of the value is in the hands of those entitled to it, and the whole controversy is settled in one suit. If the plaintiff is responsible over to a third person, or if, for any cause, the defendant is not entitled to the balance of the value, a very different rule would prevail, and justice would require that the whole value of the property should be assessed to the plaintiff." When the plaintiff has only a special property in the thing sued for, as a pledgee, and not the absolute property, and it is shown on the trial what is the exact amount of his lien against the property, a verdict for that amount as alternate value would not be error. Nor would a verdict for the possession of the property without ascertaining the value be error, under the statute. *Brownell v. Hawkins*, 4 Barb. 491; *Chadwick v. Lamb*, 29 Barb. 518, 522; *Spoor v. Holland*, 8 Wend. 445; 2 Tuck. Comm. c. 6, p. 81 Plaintiff in error seems to have overlooked the last clause of section 6, chapter 102, which says: "If the verdict omit price or value, the court may at any time have a jury impaneled to ascertain the same." The circuit court did not err in setting aside the judgment and verdict, and retaining the case for a fair trial of the rights of the parties in that court, and the same is affirmed.

Affirmed.

CHARLESTON.

45	521
146	477

KENNEWEG v. SCHILANSKY *et al.*

Submitted Sept. 15, 1898—Decided Dec. 7, 1898.

1. PARTNERSHIP—*Assignment—Partner's Interest.*

A partner has no individual assignable interest in the social assets until the social debts are satisfied. (p. 524).

2. PARTNERSHIP—*Insolvency—Assignment—Lien.*

An assignee of a partner's individual interest in an insolvent firm cannot successfully attack an alleged partnership assignment, made to secure a just partnership debt, as the latter is a lien on the social assets superior to the claims of the individual partners or their creditors. ((p. 524).

3. ASSIGNMENT—*Open Account—Equitable Assignment.*

A verbal assignment of an open account in consideration of future credit and merchandise sold and delivered is a good equitable assignment, although not afterwards reduced to writing, as promised. p. 526).

Appeal from Circuit Court, Tucker County.

Bill by C. F. Kenneweg against B. Schilansky and others. Decree for plaintiff, and the H. B. Claflin Company appeals.

Affirmed.

DAYTON & DAYTON and C. O. STRIEBY, for appellant.

CUNNINGHAM & STALLING and E. D. TALBOTT, for appellee.

DENT, JUDGE:

C. F. Kenneweg filed his bill of complaint in the circuit court of Tucker County on the 9th day of July, 1895,

against the Columbia Lumber Company and others, alleging that himself, B. Schilansky, G. Schatz, Camden Lipscomb and P. J. Sullivan were the only stockholders in said company, which had forfeited its charter, and ceased to do business; that it owed no debts except about nine thousand dollars to the firm composed of B. Schilansky and G. Schatz, which had been assigned to the plaintiff for the benefit and use of the defendant in Kenneweg Company, to be applied on the indebtedness of said Schilansky & Schatz to said Kenneweg Company; that the said Columbia Lumber Company is still the owner of a sawmill and fixtures, and a lot of sawed lumber, and that the same was being fraudulently disposed of and misappropriated by said Schilansky, and praying the appointment of a receiver, that said corporate affairs might be wound up, and said debt paid. A receiver was appointed to take charge of, preserve, and sell the property. On the 15th day of August, 1895, the H. B. Claflin Company filed its petition in said cause, seeking to prevent the sale of the property by the receiver, and alleging, among other things, "that on the 11th day of July, 1895, B. Schilansky sold, transferred, assigned, and set over unto your petitioner as collateral security all his capital stock, all claims, choses in action, accounts, and demands of every character and nature he had against the said Columbia Lumber Company, which petitioner is reliably informed and believes amounts to more than \$7,000 in excess of the capital stock, which is for the sum of \$2,400," and it denies any indebtedness to C. F. Kenneweg or the Kenneweg Company, or that said company is entitled to the debt of Schilansky & Schatz. Kenneweg answered this petition, reasserting the assignment set up in his bill, denying petitioner's rights, and demanding the relief prayed. On the 31st day of December, 1895, the cause was referred to Commissioner Jeff. Lipscomb to report the assets and liabilities of the Columbia Lumber Company. On the 24th day of November, 1896, the commissioner returned his report, in which he found the assets of the corporation in the hands of the receiver amounted to one thousand one hundred and seventy-seven dollars and twenty-two cents, which was not a sum sufficient to pay the claim of Schilansky & Schatz,

the only debt against the corporation; and which was now being held by the Kenneweg Company by assignment, and that said Kenneweg Company was entitled to the funds aforesaid. He further reported "that he has used his best efforts to get proof of the claim of the H. B. Claflin & Co.'s debt, if they have any, but has wholly failed." The H. B. Claflin Company filed numerous immaterial exceptions to this report, the principal one being as to the finding in favor of C. F. Kenneweg. The commissioner's report was fully justified by the evidence before him, and the exceptions were therefore properly overruled. After the report was filed, the H. B. Claflin Company took several depositions to prove the allegations of its petition, and finally took the deposition of B. Schilansky, to the reading of which the plaintiff objected, for the reason that it was taken too late. Neither Schatz nor Schilansky, either as partners or individuals, answered the bill, but it was taken as confessed as to them. At the March term, 1897, a final decree was entered, overruling the exceptions to the commissioner's report, sustaining the exception to the deposition of Schilansky, disbursing the fund to C. Kenneweg for the use of the Kenneweg Company, and dismissing the petition of the H. B. Claflin Company, and from this decree said company appeals assigning numerous errors, which are unnecessary to repeat here, as none of them appear to be prejudicial to the appellant's rights.

By its petition, appellant only claimed the assignment of Schilansky's interest, and this allegation is sustained by its proof. But it neither alleged nor proved that it was the owner of the Schilansky & Schatz debt, the bone it was apparently contending about, and in which it acquired no interest by virtue of the assignment of Schilansky until the partnership debts were paid. The assignment on which it relies is as follows: "For a valuable consideration from the H. B. Claflin Company, a corporation formed and doing business under the laws of the state of New Jersey, I hereby sell, set over, transfer, and assign unto the said H. B. Claflin Co., as collateral security for the payment of certain notes and open account which the firm of Schilansky & Schartz owe to said company, all my capital stock, in all claims, choses in action, accounts of every

character or nature against the Columbia Lumber Co., which was incorporated in the State of West Virginia, and operated in the village of Mackieville, Tucker County, W. Va., shipping from Hulings in said county, where some of its property now is, but which charter was forfeited in the year 1894 for the reason that the state license was not paid thereon. It is understood that this assigns every interest of every nature before and after the said charter was forfeited. Given under my hand and seal this 11th day of July, 1895. B. Schilansky. [Seal.]" This is nothing more than an assignment of Schilansky's individual interest, and does not purport to assign the claim of Schilansky & Schatz, although made to secure a debt of that firm. One partner has no assignable interest in the assets of the firm until the firm debts are paid, but one partner can assign firm assets to pay firm debts. This latter Schilansky, for some reason did not undertake to do, and his assignee only took his interest in the firm claim against the Columbia Lumber Company after payment of the firm debts; and the Kenneweg Company, being a firm creditor, and claiming under an alleged firm assignment, Schilansky's individual assignee would have no equity as against a firm creditor by virtue of his assignment, and no right to attack the alleged firm assignment. *Conway's Adm'r's v. Stealey*, 44 W. Va. 163, (28 S. E. 793.) If this were a suit to settle up the partnership of Schilansky & Schatz, the H. B. Claflin Company being a firm creditor, would have the right to attack the alleged assignment of the firm to the Kenneweg Company; but such an attempt or claim is not could do so after returning, he would prepare a document showing the transfer to us of their account against the Columbia Lumber Company, on the strength of which promise we gave them more goods." Mr. Schatz, on the witness stand, did not attempt to deny this arrangement, but simply claimed that no formal assignment had been made. The testimony of J. D. and C. J. Griffith as to admissions made by Schilansky tends to corroborate Mr. Kenneweg.

Schilansky, after the case has been closed, gives his testimony, denying any assignment to the Kenneweg Company, and claims an assignment was made to the H. B.

Claffin Company, which is the one before copied herein, being an assignment of his individual interest. This was made after suit brought, and he was deprived of the possession of the property of the Columbia Lumber Company, and the whole transaction on his part shows an evident desire to prevent the Kenneweg Company from being paid its debt for having interfered with his management of the affairs of the Columbia Lumber Company. Hence his evidence, under the circumstances, is not sufficient to open up the case anew, but the preponderance of the evidence fully establishes a parol equitable assignment, sustained as it is by the written paper bearing the partnership signature. On page 1058, 2 Am. & Eng. Enc. Law (2d Ed.) the law is stated to be, "A valid parol transfer of an account may be made without a delivery of a copy or transcript thereof." The claim of Schilansky & Schatz was an open account against the Columbia Lumber Company, which, for the purpose of gaining further credit, was pledged as security to the Kenneweg Company, they promising to make a written assignment thereof. This they never did other than the Strieby note, although they secured the goods for which the account was pledged. This was the evidence of Kenneweg on which the commissioner's report was founded. There is no evidence disputing the justice of the Kenneweg Company's debt against Schilansky & Schatz, although it is alleged in the petition that Kenneweg is largely indebted to the Columbia Lumber Company. The proof does not sustain the allegation. The H. B. Claffin Company assignment being subsequent, made in its petition, and, if it were, as the proof now stands, it is most favorable to the Kenneweg Company, Mr. Schatz testifies: "We intended to assign this [meaning the claim in controversy] to Mr. Kenneweg, as I stated before to credit our account for merchandise shipped by Mr. Kenneweg to us;" and he acknowledged writing the following letter to Mr. Strieby: "Thomas, W. Va. July 7, '95. Mr. C. O. Strieby—Dear Sir: We made a transfer to the Kenneweg Co., of our shares and stock in the Columbia Lumber Co., Hulings, and of our account against same Lumber Co., on June 1, '95, for the security of their account in Hulings against us. Mr. Kenneweg desires to

confer with you in regard—our matter. If you can, please come over here to-morrow morning with Mr. Kenneweg. Respectfully, S. & Schatz.” Mr. Kenneweg testifies as follows, to wit: “About May 1894, Schilansky & Schatz, of Hulings, owed us for goods furnished the Hulings store which bills were then due. (When I say ‘us,’ I mean the Kenneweg Company.) Schilansky & Schatz claimed that they could not pay us, as they were heavy creditors of the Columbia Lumber Company, and in lieu of the payment of the bill of Schilansky & Schatz, agreed to and made over to us collateral security for our claim all their interest in the Columbia Lumber Company, and their account against said company, and further agreed that this arrangement should continue as security for any goods we would subsequently ship them, and that their account as it increased against the Columbia Lumber Company, should be our collateral security. On the strength of this agreement we continued to ship them goods without their paying us anything on their Hulings account. About May or June, 1895, their account having increased very much, and we again refused them more goods. Mr. B. Schilansky then came to Cumberland, to learn the reason of our refusal to furnish goods, and I told him we must have some money. He said that they had no money, but that it was tied up in the Columbia Lumber Company, and, as we had their account against the Columbia Lumber Company for collateral security, and our account against them, we should feel perfectly safe. I replied that we had no written agreement, only a verbal one. He answered, as soon as he both in law and time to that of the Kenneweg Company, the court committed no prejudicial error in overruling the exceptions to the commissioner’s report, and dismissing the petition. The decree is therefore affirmed.

Affirmed.

CHARLESTON.

LAMBERT v. NICKLASS *et al.*

Submitted Sept. 10, 1898—Decided Dec. 7, 1898.

1. AGISTER'S LIEN—*Live Stock.*

One who keeps a horse or other live stock for compensation has a lien thereon for such compensation by Code 1891, c. 100, s. 15. (p. 528).

2. AGISTER'S LIEN—*Innkeeper—Attachment.*

An innkeeper or keeper of live stock who has a lien on the property does not lose the lien by levying an attachment upon the property. (p. 528).

Appeal from Circuit Court, Berkeley County.

Suit by Walter J. Lambert against B. Nicklass and others. Decree for defendants, and plaintiff appeals.

Reversed.

W. H. TRAVERS and WISNER & WOODS, for appellant.

FLICK, WESTENHAVER and BAKER, for appellees.

BRANNON, PRESIDENT:

Lambert kept a horse and buggy for Brown, claiming a lien for the keeping, refusing to let Brown take them without payment. Brown agreed that they should stand good for their keeping. Brown became insolvent and assigned for the benefit of creditors, but did not include this property in his assignment. Lambert sued for keeping the property, levied an attachment on it, the officer leaving it

in his possession. The attachment was quashed, but personal judgment was rendered for the debt. Afterwards, Nicklass Bros. & Co. levied an execution against Brown on the property, and Lambert procured an injunction against selling, and the court held that Lambert had no lien, dissolved the injunction, and gave the execution preference over Lambert's lien, and Lambert appealed.

Lambert claims a lien for keeping a horse and buggy at his stable belonging to Brown, under section 15, chapter 100, Code, that "persons keeping live stock for hire shall have the same rights and remedies for the recovery of their charges therefor as innkeepers have." It is questioned by counsel whether Lambert ever had any lien. Counsel say that agisters and liverymen have no lien at common law, as is true. 13 Am. & Eng. Enc. Law. (1st Ed. 943). They say that an innkeeper has a lien on the goods of his guest, as he has sole and exclusive possession, not concurrently with the owner; but that one who merely feeds and takes care of a horse has not sole possession, but one concurrent with the possession of the owner; that only exclusive possession gives a lien. Now, I see little difference as to possession. "The transient guest sometimes takes his horse and uses him during his stay at the inn, as does one who merely keeps his horse at the stable." "It is the keeping the guest and the keeping the horse that gives rise to the lien, not alone possession, that being only the means of enforcing pay." "It is very plain to me that the statute intended to remedy the defect of the common law, and give any one keeping live stock for compensation a lien for such compensation,—a lien like that of the innkeeper." Of course, it does not mean one who keeps stock to be hired, as there the compensation goes to the other party for use of the stock; but it means to give a lien to any one who, for hire or compensation, keeps stock. Lambert clearly had a lien.

But it is said Lambert waived or forfeited his lien by bringing action for the same demand before a justice, and levying an attachment upon the property. First, it is argued that judgment in this action merged and destroyed the lien. Judgment does merge the cause of action, so that it cannot be sued on again; but I understand that in law

the debt is one thing and its lien on given property another thing, and that judgment does not destroy the lien. The creditor may enforce both, and his election of one does not exclude the other as a remedy. "Though the debt is merged in the judgment, its nature is not destroyed or affected; and if the debt was one for which a lien was given at common law or by statute, the lien continues after judgment." 1 Jones, Liens, s. 1032a.

But it is claimed with more confidence by counsel for appellees that the lien given by this statute is like that given an innkeeper by common law, and that, as loss of possession destroys the innkeeper's lien, so the levy of the attachment took away from Lambert the possession, and gave the officer possession, and thus lost Lambert's lien. There is quoted to us the passage from Jones on Liens (section 1014), saying: "An attachment of goods by one who claims a lien on them, to secure the same debt for which the lien is claimed, is a waiver of the lien. The attachment is in effect an assertion that the property belongs to the defendant. Having made the attachment, he is estopped from afterwards asserting the contrary." Also Hermann's Law of Executors, (sec. 172), saying: "Taking property in execution at the suit of a party having a lien thereon destroys the lien by changing the possession from the bailee to the officer, though the property is left with the party. The possession must of necessity vest in the officer in order to enable him to sell the property." And citations from 13 Am. & Eng. Enc. Law, 586, and Jones, Liens, s. 328, to the effect that a carrier's lien is lost by his attaching property. As to the clause from Jones, that "the attachment is an assertion that the property belongs to the defendant." I will say that there is no force in it, because by claiming a lien the plaintiff asserts that it belongs to the defendant as much as by attaching it. He asserts the same thing by both lien and attachment, and no estoppel can, therefore, be based upon any contradiction between the two. Very little authority is cited for the above-cited doctrine; the same is cited for all the propositions above given. Regarding it unreasonable, I have sought to trace its origin, and find it in an English decision in 1828 (*Jacobs v. Latour*, 5 Bing. 130), holding that where one entitled to a lien as stable

keeper and trainer sued and sold and bought the horses under execution, he could claim, in trover against him by an assignee in bankruptcy, only under the execution, not under his lien, his lien being waived by the execution. *Legg v. Willard*, 17 Pick. 140, seems to hold that when one has a lien, and attaches for the same debt, his lien is gone; but it is a mere assertion, and no discussion of any authority. *Wingard v. Banning*, 39 Cal. 543, is cited for the proposition; but there the affidavit declared the creditor had no lien, which was an express renunciation of it. It seems only three out of five judges concurred in the opinion. In *Arendale v. Morgan*, 5 Sneed, 703, the question is considered, and the court refused to follow that doctrine, and held that where one has property in pledge for debt, and parts with possession with intent to abandon the lien, as if he agrees that it be attached at the suit of a third person, it is gone; but not so where he attaches for his own debt. This is the true position.

To sustain this loss of lien we must place it on one or the other of two ideas,—intentional waiver, or from loss of possession. As to the first, authority is abundant to show that one will not be held to waive a lien unless the intent be express or very plain and clear. The presumption is always against it. Merely taking a new security does not. *Bansimer v. Fell*, 39 W. Va. 448, (19 S. E. 545); *Hopkins v. Detwiler*, 25 W. Va. 734, 748; *Hess v. Dille*, *Id.* 97. So with the innkeeper's lien, 11 Am. & Eng. Enc. Law, 49.

And as to the loss of lien by loss of possession: An innkeeper having a lien has no right to sell the property without a judicial proceeding. If he does, he is liable to an action of trover for its unlawful conversion, besides losing his lien. His only remedy is to hold it till payment. Unreasonable this is; but, where no statute can be found providing for a sale, it is so, by much authority. 11 Am. & Eng. Enc. Law, (1st Ed.) 46; Jones, Liens, s. 523. In fact, on the mere strength of lien, he can sue neither at law nor in equity, if there is no statute to allow it. It is different from a pledge or pawn. 13 Enc. Pl. & Prac. 127; 1 Jones, Liens, ss. 1033, 1038. The horse is in the innkeeper's stable eating its head off, and he has no remedy. Suppose,

however, by reason of nonresidence or other cause, the innkeeper can sue out an attachment, why shall he not do so? He is not thus waiving, but enforcing, his lien. Why it should be said that, when the officer levies on the property to enforce this lien, the innkeeper loses his lien because he gives up possession, I cannot see. The officer is his agent for this purpose. To say so is technical in the highest degree, and defeats justice. The innkeeper is not surrendering possession to the owner, nor to an officer acting in furtherance of his demand. He could bring a suit, as shown above, without forfeiting his lien; and by resorting to an attachment he simply availed himself of a fact giving him the right to attachment to enforce a debt for which there was a lien, using a cumulative remedy. Houck on Liens (section 6) says, "If possession is relinquished after the lien attaching, the lien is gone; for, by parting with possession, the creditor shows that he trusts to the personal credit of the debtor," and cites numerous authorities. This is so where he lets the owner or an officer under process for debts of others have possession. Then you can fairly say that he looks to the debtor only; and that as Houck says, is the reason why surrender of possession destroys the lien. But how can we say that Lambert intended to look to the personal credit of Brown by an act which told the very reverse, and told that he looked to the property for pay, not to Brown? Furthermore, Brown expressly pledged the horse to Lambert for his keep. Lambert could sell it as a pawn. This he could do by agent, and the agent's possession would be his. Is the officer anything but his agent? He is responsible for the officer's trespass, because he acts for him. Judge Story condemns this doctrine as not well established, and says the Massachusetts ruling was local to that state. Story, Bailm. s. 366. In *Townsend v. Newell*, 14 Pick. 332, one had goods, with right to lien, and an attachment was levied in favor of a creditor, and he refused to give them up, but kept possession, and gave a receipt to the officer for them. Later he levied an attachment for his own lien debt, still retaining possession, but receipting to the officer for the goods. It was held that the lien was not lost. There, as in this case, the officer let the lien owner keep the goods in

his custody. In that case, it is true, he expressly claimed his lien: but who imagines that Lambert intended to give up his lien? His attachment itself speaks the negative.

In that case, after levy, it was as much the officer's possession as in this, and the court did not give it the force of forfeiture of lien, but said, as the party did not intend to surrender it, it still held good. There is no evidence that Lambert intended to give up his lien, and if it stands on intention, and not on loss of possession, he who asserts such intention must make it clear. In *Whitaker v. Sumner*, 20 Pick. 399, where one having a pledge allowed a levy for a debt once owned by him and debts of strangers, he was held to have lost the lien; but Chief Justice Shaw was careful to say, "We would not be understood hereby to hold that an attachment under all circumstances, though made by the party holding the pledge, or by his consent, would be a waiver of the lien." I have not said anything about jurisdiction inequity, as the question was not raised or discussed. Decree reversed, and the case is remanded, with direction to the circuit court to enter a decree allowing Lambert's debt as a lien, to be paid out of the proceeds of the property, in preference to the execution of Nicklass Bros. & Co.

Reversed.

CHARLESTON.

MICHAELSON v. CAUTLEY.

Submitted Sept. 20, 1898—Decided Dec. 7, 1898.

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46	150
46	734
45	533
447	591
45	533
48	397

1. APPEAL—*Certiorari*—*Sound Discretion*.

The writ of *certiorari* when awarded in civil cases before justices, under sections 2, 3, chapter 110, Code, is an appellate process, designed to effect the ends of justice; and the circuit court has a large discretion in awarding the same, reviewing judgments, and granting new trials, thereunder, and unless such discretion is plainly abused, this Court cannot interfere therewith. (p. 537).

2. NEW TRIAL—*Evidence*—*Appeal*—*Error*.

If the evidence presents mixed questions of law and fact, material to the issue involved, about which two reasonable men, learned in the law, might differ as to the proper determination thereof, the circuit court commits no appealable error in awarding a new trial. (p. 540).

3. NEW TRIAL—*Review on Appeal*—*Evidence*.

If improper testimony in favor of the prevailing party is admitted by the justice, and it be doubtful whether the same was prejudicial to the opposite party or not, the action of the circuit court in awarding a new trial will not be reviewed by this Court. (p. 542).

Error to Circuit Court, Kanawha County.

Action by O. H. Michaelson against Lucy R. Cautley.
Verdict for plaintiff. From an order granting a new trial, plaintiff brings error.

Dismissed.

W. S. LAIDLEY, for plaintiff in error.

BROWN & BROWN, S. L. FLOURNOY, JOSEPH M. BROWN and
W. MOLLOHAN, for defendant in error.

DENT, JUDGE:

On a writ of error, the plaintiff complains that the circuit court did not quash the *certiorari* allowed the defendant in the above case to a judgment of a justice founded on the verdict of a jury for three hundred dollars, but reversed the judgment and awarded a new trial. The facts are as follows: The plaintiff rented of the defendant the first story and the basement of a certain building situated on Quarrier street, in Charleston. The upper portion of the building was rented by other tenants, except a certain room, which was vacant. On the night of the 4th of February, 1898, an exposed water pipe in this vacant room burst, and the water ran out, down into the room occupied by plaintiff and damaged his goods to a sum in excess of the three hundred dollars damages demanded. The place to turn off the water from the building was in the basement, rented by plaintiff, and no one could reach it except by his permission. During the middle of the night, when the leakage was discovered, a messenger was sent to plaintiff, who lived some distance away, to inform him and get the key; and the water was then turned off, and due effort made to save plaintiff's goods, consisting of musical instruments, etc.

On the trial of the case before the jury, the justice on motion of the plaintiff, gave the two following instructions, to which defendant objected: "(1) That if the jury believes from the evidence adduced that the plaintiff was a tenant of the defendant, and that in consequence of the defective plumbing or want of repairs, or negligence of the defendant, the plaintiff suffered an injury to his property without any fault of his own, then the plaintiff is entitled to recover damages for the injury sustained in consequence thereof. (2) If the jury find that the defendant is liable to the plaintiff, that the measure of damages for the injury done is that amount that will compensate and make the plaintiff whole,—the difference in value of the property injured between that which was immediately before the injury done, and that afterwards." These instructions appear to properly propound the law, and are simply to the effect that if the damages suffered by the plaintiff were

caused by defective plumbing, owing to the negligence of the defendant, the jury should award such damages as plaintiff had suffered by reason of such negligence. The plumbing is a part of the building, and the landlord is liable to his tenant for defective construction thereof, although there is no covenant to repair. 12 Am. & Eng. Enc. Law, 687; *Stapenhorst v. Manufacturing Co.*, 15 Abb. Prac. (N. S. 355). The room in which the leak occurred was not rented, but was vacant, and under the control of the landlord. The pipe was exposed, and an inevitable accident happened by reason of the freezing weather. This is an accident that in this climate, in the month of February, can be easily foreseen and provided against, either by proper protection of exposed pipes, or turning off the water supply, and is one that only calls for ordinary care. In such case the landlord is liable, unless he can shift such liability to the tenant by reason of the latter's contributory negligence. If the tenant is fully informed of the defect, and has it in his power to avoid the same by proper precaution on his part, and fails to do so, his negligence, being contributory, will relieve the landlord from liability. *Shear & R. Neg.* (4th Ed.) s. 722; *Brown v. Elliott*, 4 Daly, 329; *Mendel v. Fink*, 8 Ill. App. 378; *Kenny v. Barnes*, 67 Mich. 336, (34 N. W. 587).

The defendant asked for the following five instructions, which were refused by the justice: "(1) The court instructs the jury that if they believe from the evidence that there was no express contract to the effect that the landlord, Cautley, should keep in repair the house and tenement occupied by her tenant, Michaelson, then they should find for the defendant, Cautley. (2) The court instructs the jury that, if they believe from the evidence that there was no express contract on the part of Cautley to keep in repair the building leased from her by Michaelson, then the jury should find said defendant, Cautley, not liable for any damages which plaintiff, Michaelson, might have suffered from water leaking and running down from apartments in said building above those occupied by Michaelson. (3) The court instructs the jury that if they believe from the evidence that the landlord, Cautley, had not covenanted to repair the building leased by her tenant, Michaelson, and

that Cautley is not chargeable with any affirmative misfeasance, or neglect of positive duty, then the jury should find for the defendant, Cautley. (4) The court further instructs the jury that if they believe from the evidence that the premises leased by the plaintiff from the defendant were not in good repair at the date of the lease, or thereafter, and that by reason of said premises being out of repair the plaintiff was damaged, and that there was no covenant or agreement by the defendant that she should repair said premises, then the jury should find for said defendant, Cautley. (5) The court further instructs the jury that if they believe from the evidence that the plaintiff, Michaelson, was damaged by the water pipe bursting and leaking water in a room in the leased building above those rooms leased by said Michaelson in said building, and that said water pipe which caused said damage was not constructed or used to supply water to that part of said building which was leased by said Michaelson, and that said defendant, Cautley, had not contracted to repair said premises and had not caused said damage by any act of affirmative misfeasance, or neglect of positive duty, on her part, then the jury should find for the defendant, Cautley." These instructions were not proper in this case, for it does not involve the question of repair, but defective construction of the building, owing to the water pipe not being properly protected from the frost in a room in the building not under rent or occupied by any one; hence it was under the control of the landlord. If she had gone up there in the nighttime and flooded the building with a hose to the same extent, her legal liability would have been of the same character, except her conduct would have been more willful. Negligence in looking after the matter herself, or having her agents or tenants to do so for her, was the cause of the leakage. If the room where it occurred had been under rent to the plaintiff or other person, the liability might have shifted.

The only remaining question is as to whether the circuit court erred in setting aside the verdict of the jury on the evidence alone. In the case of *Grogan v. Railroad Co.*, 39 W. Va. 415, (19 S. E. 563, syl. point 2): "Though evidence is conflicting, the court may set aside the verdict if against

the weight of the evidence, but such power should be exercised cautiously. When the court does so, its action is regarded with peculiar respect in the appellate court, and will not be reversed, unless plainly wrong." This is the rule as to trials had in the circuit court. It should be applied with equal liberality as to trials had before justices, when reviewed by the circuit court, and a new trial has been awarded. In the case of *Harrow v. Railroad Co.*, 38 W. Va. 717, (18 S. E. 926), JUDGE HOLT says: "The statutory writ of *certiorari* is intended as a method whereby the rulings of the justice, etc., may be reviewed,—especially his rulings granting or refusing to set aside verdicts; and the scope and tenor of the act shows plainly that it was intended that the circuit court should be liberal in granting it, so far as it is a substitute for appeal from the judgment of a justice, so that the petitioner may have the judgment of the justice reviewed upon the merits, and such judgment or order made upon the whole matter as law and justice may require." The statute which provides *certiorari* as an appeal or appellate remedy was enacted for the purpose of, so far as possible, obviating the evil effects of the holding of the Court in the case of *Barlow v. Daniels*, 25 W. Va. 512, and *Hickman v. Railroad Co.*, 30 W. Va. 296, (4 S. E. 654, and 7 S. E. 455), that a fact tried before a justice's jury of six persons could not be otherwise re-examined than according to the rules of the common law (meaning thereby writ of error), and that a justice's tribunal, not being a court of record, to which such writ lies, the Constitution inhibited the re-examination of jury trials before justices by an appellate court in any manner whatsoever, thus making them a finality. To sustain the position taken by the Court at that time, it was held that the word "appeals," as used in the clause of the twenty-eighth section of Art. VIII. of the Constitution, in these words, "appeals shall be allowed from judgments of justices in such manner as may be prescribed by law," was used in its technical sense strictly, and did not include appellate proceedings generally, and that, therefore, the legislature had no authority to grant such "appeals" in cases where a jury trial was involved. See JUDGE SNYDER's opinion, 25 W. Va. pages 521 to 523 inclusive. Yet in the case of *Fouse v. Van-*

dervert, 30 W. Va. 327, (4 S. E. 298), JUDGE SNYDER, again rendering the opinion of the Court, on page 331, 30 W. Va. and page 301, 4 S. E., says: "Is said chapter 110 constitutional? The constitutional provision first above quoted expressly declares that 'appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law.' This provision positively commands that appeals from judgments of justices shall be allowed, and it expressly authorizes the legislature to prescribe the manner in which they shall be allowed. The statute under consideration was enacted a very short time after said Constitution was adopted, and, as it has prescribed no other effective mode by which judgments of justices of the character now before us can be reviewed, it is the duty of the courts, if they can do so consistently with the legal rules of interpretation, to construe the statute as giving the circuit courts such power of review. The only difficulty in giving such construction is the use of the word 'appeal' in the constitution, instead of common-law terms, 'writ of error' or '*certiorari*.' The term 'appeal' was unknown to the common law. * * *" The able judge then reaches the conclusion (directly contrary to the one in *Barlow v. Daniels*) that the word "appeal" means *certiorari*, or any other process the legislature may adopt for the review of judgments of justices. Here there is a direct conflict of the same authority, which cannot be reconciled. How much better would it have been for the Court to have held in the case of *Barlow v. Daniels*, that the two provisions of the Constitution under consideration should be construed together, so as to read: "In suits at common law, where the value in controversy exceeds twenty dollars, exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved, and in such suits before a justice a jury may consist of six persons. No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law," except "appeals shall be allowed from judgments of justices in such manner as may be prescribed by law." This was undoubtedly the plain meaning and intention of the constitution makers, and, if it had been adhered to, the illegal and inconsistent conclusions of

the court might have been avoided, and the ends of justice better promoted. It never entered the minds of the constitution makers to construe the word "appeals" to mean "writ of error" or "*certiorari*" in this connection; for they well knew that a justice's court was not a court of record, nor the justice usually a man learned in the law, and they never intended that upon his shoulders should be imposed the laborious task of instructing juries on intricate and difficult points of law, and of making up and signing bills of exceptions embodying his rulings. The jury was reduced to six in number for the very reason that an appeal as a matter of right would furnish an adequate remedy, if they erred, or there was dissatisfaction with their verdict. It is foolishness to talk about the great common-law right, of trial by jury, and yet say that such jury may consist of less than twelve persons, and that six or three or one person may be such jury, if the people so declare. It is like sticking a knife into a man's heart, and at the same time assuring him you do not intend to hurt him. When the people depart from the number twelve, they do away with the common-law right of trial by jury. Not only is this true, but the rules of common-law jury trials have been greatly encroached upon by legislative enactment; so that the Constitution must be considered to read, "No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law" as modified by legislation. Especially is this true when this section is construed in connection with section 21, Art. VIII, to-wit, "Such parts of the common law, and of the laws of this State as are in force when this article goes into operation and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the legislature." The rules of common law are subject to alteration or repeal by the legislature. Hence the conclusion is inevitable that the meaning of the words used in the Constitution, to-wit, "according to the rules of the common law," were intended to be according to the procedure of common-law courts in contradistinction to equity courts, as modified, prescribed, and fixed by legislative enactment, and that a fact once tried by a jury could not be re-examined or retried except

by another jury, if either party required it, according to such procedure. Questions of law or questions of mixed law and fact may be reviewed by appeal, or in any other manner the legislature may prescribe, as the section can only apply to a fact alone tried by a jury, and re-examination and retrial before another jury according to common-law procedure, as provided and regulated by legislative enactment, fully satisfy the constitutional requirement. This gives the legislature full control, except that facts must be re-examined and retried until finally settled, if either party require, by a jury, leaving questions of law to be determined by the courts. Thus is the great common-law right of trial of facts by a jury of twelve persons impartially selected preserved, untouched either by constitutional or legislative enactment. The right of appeal from the crude rulings of the justice secures it in a court of record presided over by a judge learned in the law. These considerations lead to the conclusion that the legislature, in bestowing on the circuit courts or judges the authority to review the facts as found by a jury of six in a justice's trial, intended to give them a large discretion, so that the "great common-law right of trial by jury" might be preserved, not only in name and form, but in pristine purity, vigor, and substance. The circuit court or judge is not authorized by sections 2, 3, chapter 110, Code, to grant such "appeal" as a matter of right, but as, in his discretion, law and justice may require. If the judgment brought in review is plainly right, law and justice require that it shall be final, that there may be an end to useless litigation. But if there are strong probable grounds to suppose that the merits have not been fairly and fully heard, and that the decision is not agreeable to the justice and truth of the case, it should be retried. If the circuit court on review reaches the conclusion that the matter ought to be retried, and the evidence presents such a case that reasonable men learned in the law, might differ in regard thereto, this Court ought not to interfere until at least there has been a retrial. Otherwise the sacred common-law right of trial by jury, instead of being preserved, is perverted into an instrument of wrong and injustice.

In the present case the justice permitted, as is usual in

such trials, the witness Michaelson to testify, against the objection of the defendant, that he thought "that the pipe had been frozen and bursted during Thursday, the 3d, and that the ice in the pipe prevented the water from flowing, and that the plumber failed to see and repair it, and that afterwards, when the weather moderated, the water dissolved the ice, and flowed out and run down on the goods of the plaintiff;" "that the loss was occasioned by bad plumbing, or negligence in placing the pipes in the building, as they were, or by the negligence of nonrepair, and overlooking the break, and leaving the same unrepaired; that it was this negligence that caused the injury to the plaintiff, and that without any fault on his part;" "that he has suffered loss from the negligence of the defendant and her agents or servants." This is all mere opinion evidence, which was highly improper, and would not have been admitted in a court learned in the law. Other evidence of an expert character was also erroneously introduced and admitted. This would not be allowed to disturb the verdict, if the legal evidence plainly justified it. But, while the evidence tends to show the negligence of the defendant in allowing the water pipe to be exposed in a vacant room entirely under her control, it also tends to show that the plaintiff was aware of her negligence and of the danger of the pipes freezing, and refused, in the daytime, to turn on the water or have anything to do therewith, and that at night, when he closed his store, he had under his control the only means of turning off the water, except the outside street connection, in charge of the waterworks officials; and without turning off the water, which he had the right to do for his own protection, he left the store, taking the key thereof with him, so that no one else could turn off the water until he could be found and the key obtained, while the defendant, having provided the plaintiff with means of self-protection, so far as the proof shows, was entirely in ignorance as to whether the water was off or on the night the damage occurred, thus tending to show the plaintiff guilty of contributory negligence; and instead of permitting this question to be settled by the jury from the admissible facts and circumstances, the plaintiff is permitted to tell them that he was injured by the neg-

ligence of the defendant without any fault on his part, thus allowing him to state a conclusion of law and fact improperly, and to the prejudice of the defendant. In the case of *Taylor v. Railroad Co.*, 33 W. Va. 39, (10 S. E. 29, syl. point 3), the law is settled to be "where illegal evidence is admitted against the objection of a party, it will be presumed that it prejudiced such party, and if it may have prejudiced, though it be doubtful whether it did or did not, it will be cause for the reversal of the judgment." *Hall v. Lyons*, 29 W. Va. 410, (1 S. E. 582); *Kerr v. Lunsford*, 31 W. Va. 659, (8 S. E. 493); *Moore v. Huntington*, 31 W. Va. 842, (8 S. E. 512); *State v. Kinney*, 26 W. Va. 141; *Beach v. O'Riley*, 14 W. Va. 55; *State v. Musgrave*, 43 W. Va. 673, (28 S. E. 813). As to a case resembling the present one in some particulars, see *Brown v. Elliott*, 4 Daly 329.

From these considerations, the conclusion follows that the circuit court did not abuse its appellate powers in setting aside the verdict of the jury and granting the defendant a new trial; and therefore the writ of error granted by this Court is dismissed, as improvidently awarded.

Dismissed.

CHARLESTON.

SHANK v. GROFF *et al.*

Submitted Sept. 9, 1898—Decided Dec. 7, 1898.

45	543
50	181

45	543
182	152

1. **TENDER—*Sufficiency of Tender—Offer to Pay.***

While in a tender an actual visible production of money is dispensed with where the party denies all right to pay any sum, yet it must appear that there was an actual offer to pay, and that the tenderer had the money, and was about to produce it, and would have done so if he had not been prevented by such denial of right to pay. (p. 544).

2. **TENDER—*Interest—Demand.***

Tender, to stop interest, must be of an exact amount, and must be kept good and ready at all times to be paid to the creditor on demand, which must be shown by the tenderer. (p. 547).

3. **MORTGAGE—*Equity Pleading—Bill in Equity—Tender.***

A bill to redeem a mortgage must allege and rely upon a tender if one is claimed; and the money must be paid into court. (p. 546).

4. **TENDER—*Equity Pleading—Interest***

One making a tender, and then using the money, and afterwards failing to pay the money into court, with a pleading relying upon such tender, loses its benefit, and will not be released from interest by it. (p. 546).

Appeal from Circuit Court, Grant County.

Bill by Samuel B. Shank against Samuel Groff and others. A decree was rendered, from which defendant Given appeals.

Reversed.

GEORGE BAYLOR and BENJ. BAILEY, for appellant.

F. M. REYNOLDS, L. J. FORMAN and J. N. McMULLAN, for appellee.

BRANNON, PRESIDENT:

This case was once before in this Court. 43 W. Va. 337, (27 S. E. 340). The bill claimed that a deed, absolute on its face, was in fact but a mortgage, and it sought to compel the parties claiming under that deed to so treat it, and allow a redemption of such mortgage. This Court decided that it was a mortgage, and directed that a redemption be allowed. When the case went back, it was referred to a commissioner to report the proper sum "to be paid in such redemption," and his report fixed a sum which excluded interest for some years, because of a tender which Shank claimed he had made, and the court sustained the commissioner, and allowed a redemption at the sum fixed by him. To this abatement of the debt by the allowance of said tender, Given, the party claiming the debt, objects and appeals.

I do not think that the evidence shows any tender. It seems to show rather a mere talk between the parties. Shank claiming the right to redeem, and the other parties denying it; a mere expression by Shank that he desired and was willing to pay the proper sum to redeem, not even an actual offer, with money in his pocket to redeem. A mere proposition to redeem will not do. The strict law of tender requires the actual production of a precise and proper sum of money in the out-stretched hand, so that the creditor may take it. I know that circumstances will mitigate this strictness, but still there must be what shall be called an actual offer of the actual money; it must amount to that. "Mere readiness and willingness to pay the debt amount to nothing without an offer or tender of payment, and a refusal by the creditors." 25 Am. & Eng. Enc. Law, 916; *Moore v. Harnsberger's Ex'rs*, 26 Grat. 667; *Moynahan v. Moore*, 77 Am. Dec. 474. Though it is claimed in this case that the parties entitled to the money at the time of this alleged tender refused to allow a redemption, and that such refusal dispenses with the production of actual money, yet it must be clear that the offer to pay was an actual offer, with money present on the person of the tenderer, though not presented to sight. If the party had not the money, and his proposals to pay were a mere pretense,

surely it would be no good tender. Therefore the circumstances must be such as to show that the party was ready to make actual payment, and that he would have done so but for such refusal. "Actual tender of money is dispensed with if the debtor is willing and ready to pay, and about to produce it, but is prevented by the creditor declaring he will not receive it." *McCalley v. Oley*, (Ala.) 42 Am. St. Rep. 87 (s. c. 12 South. 406). Shank says that he went to Keneagy and Groff and said to each one that he was there to pay the money, but he does not say that he had the money, that he showed it, that he actually offered it; nor does he express any sum that he offered. Indeed, it appears that likely he did not know the sum to be paid, but that it was to be ascertained by calculation. Anyhow, he does not say what sum he offered to pay, nor even that he had the money there to pay, nor does he give date of offer. We must be able to say that he had the money on his person, and we cannot. *Moynahan v. Moore*, 77 Am. Dec. 474. "A plea of tender ought to state particularly the day when it was made. Instead of pleading that he offered the principal and all the interest due, the defendant ought to compute the interest, add it to the principal, and say that he offered a sum certain." *Downman v. Downman's Ex'rs*, 1 Wash. (Va.) 26. But a conclusive consideration against the allowance of this tender is that it was made in the fall of 1891, and in 1893 Shank brought this suit, not to enforce a tender, nor to declare the deed a mortgage, and allow the sum that had been tendered to be paid in full redemption, showing the truth of the tender, and that he still insisted upon it; but the bill and two amended bills waived such tender, if it ever existed, by admitting repeatedly that there was due and owing from Shank the sum of sixteen thousand dollars, with interest thereon from the 1st day of April, 1889, and averring a willingness to pay that sum and that interest, and offering to pay it, and asking the court, not to declare that he owed a specific amount as one tendered, but to ascertain the amount by reference to a commissioner. He insisted in his bill that he had the right to force Keneagy and Groff to convey and release the land "upon the payment of the sum of \$16,000, with interest thereon from the 1st day of April, 1889."

Again and again, in these bills, did Shank admit that that sum and that interest were due from him. After he had made a tender in 1891, why did he not insist upon it in these bills filed in 1893? Why offer to pay more than was due from him? And he swore to the bills. The bills are utterly inconsistent with any idea that a tender stopping the interest in 1891 had been made. After he had made that tender, he should have pleaded and relied upon it in his bill; and, not only that, but he must bring the money into court with his bill, else the tender is unavailing, even if he had made it, and made a legal one. He neither pleaded that tender nor brought the money into court. He must bring it into court with his bill, so that the creditor can accept it if he wishes. *Gilkeson v. Smith*, 15 W. Va. 44; *Shumaker v. Nichols*, 6 Grat. 592; 25 Am. & Eng. Enc. Law, 932; *Spann v. Baltzell*, 46 Am. Dec. 346. The nearest approach to mention of any tender in the bill is the very general language that he "offered to pay them whatever was due on the Henning interest, but they, and each of them, refused to accept said amount, or any part thereof," and that he was ready to pay into court whatever sum the court might determine to be due; but he mentioned no amount as having been tendered, and relied on no tender, but repeatedly admitted that he owed sixteen thousand dollars, with interest from April 1, 1889. This tender was not in the pleadings, but was first presented before the commissioner by a claim made for abatement of interest. This is no plea of tender. It is simply a bill to redeem on the payment of such sum as the court should fix. "If the bill be brought on the ground of a tender made and refused, the tender should be followed up by payment into court at the time of the filing of the bill, which should contain a proper averment of a compliance with this requirement." *Jones, Mortg. s. 1095*. I should think, if no actual money is produced, there ought to be a statement of the sum offered or ready to be offered. "Tender made and refused, to stop interest, must be the exact amount due, and must be kept good and ready at all times to be paid to the creditor at his demand, and on plea must be followed by the payment of money into court." *McCalley v. Otey* (Ala.) 42 Am. St. Rep. 87 (s. c. 12 South 406). No sum was tendered

or named, but it seems that, if he was ready to pay, the creditor must count the debt, and fix the sum. This is no tender.

But there is another strong argument against abating from the creditor's debt interest by reason of the alleged tender. The money was not paid into court, nor deposited where the creditor could get it, nor, in a legal sense, kept ready for him. Shank seeks to cut the creditor out of interest, when he used the money himself, and derived interest therefrom. Money of one man, used by another, as justly calls for compensation by way of lawful interest as does the use of a horse or any other property, and the case must be plain to deprive its owner of this legal reward. All books say that the tender must be kept good, and many strong cases say that, if the tenderer use the money, it destroys the tender. JUDGE DENT strongly presents this view in *Thompson v. Lyon*, 40 W. Va. 97, (20 S. E. 812). I quote from a strong opinion in *McCalley v. Oley* (Ala.) 42 Am. St. Rep. 90 (s. c. 12 South. 407), as follows: "Unless the tender is kept good all the time,—that is, unless the debtor is willing and prepared to make payment at any time after the tender, if the creditor should conclude to receive it, and until the money is paid into court upon a plea,—the debtor is chargeable with interest. He cannot make a tender to-day, and then use the money for his profit, and escape payment of interest. He is released from the payment of interest upon the supposition that he has been deprived of the use of the money by holding himself in readiness all the time to pay his creditor upon demand. The burden to make this proof, when the tender is denied, rests upon the debtor who seeks to avail himself of the benefit of a tender." I held the view in the *Thompson Case* that generally the use of the money by the debtor did not deprive him of his tender; but where, as in this case, there is a claim of tender, and later a bill filed, and the party does not yet even pay the sum into court, but still uses it, his tender cannot stop interest. What right or justice has he to receive interest and pay none? I am not sure now but that JUDGE DENT's position was right in all cases, though the authorities are divided on it. We think the sum proper to be decreed in this case

is sixteen thousand dollars, with interest from the 1st day of April, 1889, and that the alleged tender is unavailing. We reverse the decree, and remand the case that a decree may be entered as herein directed.

Reversed.

CHARLESTON.

VINTROUX v. SIMMS.

Submitted Sept. 20, 1898—Decided Dec. 7, 1898.

1. NEW TRIAL—*Verdict—Evidence.*

Where the verdict of a jury is wholly without evidence on a point essential to a finding, or the evidence is plainly insufficient to warrant such finding by the jury, the same should be set aside and a new trial awarded. (p. 552).

2. ADVERSE POSSESSION—*Boundaries—Interlock—Color of Title.*

Where the claims asserted by adjoining landowners as to their respective boundaries are such as to cause an interlock, and either of the parties is in actual adverse possession of a part of the land claimed by him under his deed outside of the interlock, and the other is in actual adverse possession under color of title of the land embraced in the interlock or land in controversy, claiming under and to the limit of his deed, the latter will, in contemplation of law, be regarded as being in actual adverse possession of all the land in the interlock, not simply that actually occupied or enclosed by him. (p. 553).

3. ADVERSE POSSESSION—*Interlock—Color of Title.*

If such party actually in adverse possession of the interlock under color of title retains such possession for ten years, he will be entitled to hold the same, although the other party may be in possession of his land outside of the interlock. (p. 553).

Error to Circuit Court, Putnam County.

Ejectment by C. A. Vintroux against W. H. Simms. There was a judgment for plaintiff, and defendant brings error.

Reversed.

WARTH & BRIGGS, for plaintiff in error.

BROWN, JACKSON & KNIGHT, W. R. GUNN, and RUFUS SWITZER, for defendant in error.

ENGLISH, JUDGE:

This was an action of ejectment brought in the circuit court of Putnam County by C. A. Vintroux against W. H. Simms to recover a certain tract of land described in the declaration as containing three hundred and eighty-four acres and described by metes and bounds. The question is one of boundary, and its solution requires the ascertainment of the true location of the division line between the lands of the plaintiff and defendant. On the 27th of May, 1896, it was ordered, by consent of parties by their attorneys, that G. F. Anderson, of Putnam County, and Thomas Matthews, of Kanawha County, be appointed to go upon the lands and do such surveying as either party might require, and return three fair plats and reports of said survey. On September 30, 1896, the general issue was pleaded, and on the 27th of May, 1897, the cause was submitted to a jury, which resulted in a verdict for the plaintiff. The defendant thereupon moved the court to set aside the verdict as being contrary to the law and the evidence and to award a new trial. This motion was overruled by the court, defendant excepted and took a bill of exceptions, judgment was rendered upon the verdict, and the defendant obtained this writ of error.

The defendant claims that the court erred in rejecting instruction No. 4 asked by him to be given to the jury upon the trial, which reads as follows: "The court instructs

the jury that in an action of ejectment the plaintiff cannot establish his own lines by running and locating the lines of the defendant's land, unless the plaintiff also show, to the satisfaction of the jury, that the plaintiff's and defendant's lands join along the disputed line or lines, and that unless they believe from the evidence in this case that the line from A to C, as laid down on the Matthews map in this action, is the line of the plaintiff's land as called for in her deed, they cannot find that as the true line between the plaintiff and the defendant." Now it surely was necessary as a prerequisite to recovery that the plaintiff should not only show a good title in herself, but that she should show by competent evidence that the calls of her deed embrace the land in controversy. The line on the map run by said Anderson and Matthews from A to C is claimed by the plaintiff to be the true line between herself and defendant, and the witness Anderson, in giving his testimony, states that A represent a known corner, and that he ran by the calls of plaintiff's deed from A to C; that he went to the corner at A, and, reversing the call of plaintiff's deed N. 5 deg. E. to S. 5 deg. W., and adding the variations he ran the course given, and it took him to C, and, having previously stated that he calculated the variation in the courses since 1838 and found it 2 deg. 54 min., and that by beginning at the dogwood corner at A and reversing the call N. 9 deg. 3 min. E. to S. 9 deg. 3 min. W. and following that course it brought him to C on the map, and, when asked on cross-examination to explain how he was able to make the line called for on the plaintiff's deed when run at a variation of S. 8 deg. W. from the dogwood corner at A bring him to the same point as the line of the defendant's deed which he ran S. 9 deg. 3 min. W., he replied, "I can't explain how or why it is, but it is so." His attention was also called to the fact that the earliest deed in plaintiff's chain of title giving the same course and distance as the plaintiff's deed along the line in controversy was the deed made in 1853 by Sam Lewis to W. T. and L. E. Vintroux. He was asked if he calculated any of the variations used by him in making his survey of the A—C line from that deed, and he replied, "I didn't know anything about such a deed; I was not shown it;"

and, when asked what would be the proper variation calculated from the difference of time between the date of the deed from Lewis to Vintroux and the date of the survey of 1894, he replied that the variation would be about 3 minutes per year, or 2 degrees and 3 minutes for the whole time, and that if the line of the plaintiff's deed arriving at the dogwood A should be reversed and run according to the mathematical variation, it would run to the left or east side of the point C, but he could not say just where, without instruments, as he had not run the line on that variation and did not know just where it would go; and when handed instruments, and asked, if the line from A to C was correctly laid down on the map as S. 9 deg. 3 min. W., to show on the map approximately where a line would run on a course S. 7 deg. 3 min. W., he replied that he could not do it without additional instruments, and when handed the instruments called for, replied he did not think they were sufficiently accurate, and for that reason he could not tell where the line would run. When asked if it would not run near the red line or the green line (the red being claimed by the defendant as the true line), he replied he thought it would run somewhere a little to the left of the red line, but he could not tell exactly where. When asked if the corner established at K was not a compromise corner between the plaintiff and Mr. Kirtly, who owned the adjoining land, he said the corner at K was gone, "and I ran the two lines, I have spoken of from A to K and from J to K, and they both agreed to the corner which I established at the point where I brought the lines together." Now, it was a matter of vital importance, in properly adjusting the controversy between the plaintiff and defendant, that the plaintiff's line running south from the point A should be correctly and accurately established, and yet the jury was asked to determine this question, and did so in favor of the plaintiff, reaching their conclusion as to the locality of the plaintiff's line influenced largely, as we must believe, by listening to testimony of the character above detailed by the county surveyor, who assisted in executing the order of survey, who had been upon the land, and whose evidence we must presume had a controlling influence upon their verdict. Considering, then, the character of this

testimony upon this vital point as to the proper location of said line, I regard said instruction No. 4 which was rejected by the court as pertinent and proper, and hold that the court erred in rejecting it. The testimony in the case shows that marked trees were found along the line as run from A to C by Anderson, but nothing is shown as to the age of the marks, or by whom made, although other lines had been run in that locality at former periods. Can we, then, say there was any testimony before the jury of such character as would warrant them in definitely fixing and determining the true division line between the lands of plaintiff and defendant? This may be said to be a matter for the jury to determine, but can a jury ascertain matters of this kind in the absence of proper testimony? Surely not. In the case of *Beall v. Railway Co.*, 38 W. Va. 526, (18 S. E. 729, syl. point 2), it was held: "Where the verdict of a jury is wholly without evidence on a point essential to a finding, or the evidence is plainly insufficient to warrant such finding by the jury, the same should be set aside, and a new trial awarded." This, I think, states the law correctly.

Again: The uncontradicted evidence of the defendant shows that for more than ten years he and those under whom he claims had held open, notorious, and uninterrupted possession of the land in controversy under color of title, which of itself would prevent the plaintiff from recovering in her action. On this question SNYDER, JUDGE, delivering the opinion of the Court in the case of *Core v. Faupel*, 24 W. Va. 242, says: "The effect of the statute is to render a continued adversary possession for 10 years conclusive in the action of ejectment, not only against the possession, but the title, of the true owner. The result is so absolute that such adversary possession operates as a transfer of the legal title, and is not only a sufficient defense on the part of the defendant, but a sufficient ground for the plaintiff to recover the land to which he has so acquired title, against the strongest proof of better title." At this point we may call attention to the evidence of Pat Miner, whose testimony is short, and who says: "I know where the clearing is out there on the hill next to the line between Mr. Simms and Mr. Vintroux. I cleared up

the ground and built the cabin and fence, myself, under a contract with Mr. Joe Simms, the father of W. H. Simms. He let me stay there two years, for the work I done. I left there and went to St. Albans to live. Mr. Simms showed me where to put the fence, so as not to get over the line, and I put the fence right where he showed me." This testimony clearly shows that Joseph Simms in his lifetime claimed to the red line, which the map shows near the cabin that Pat built, and just outside of the inclosure. John Grieser states in his testimony that he is acquainted with the clearing and improvement claimed by Simms in this suit; that he has known it for a long time,—he thinks about sixteen years; that the house and fence have been there ever since he has known it. Joseph Simms, as we have seen, was not only in possession of this land, but claimed it under color of title, and he would not therefore be limited to his inclosure. Section 19, chapter 90, of the Code provides that: "In a controversy affecting land, when a person claiming under a patent deed or other writing shall enter upon and take possession of any part of the land in controversy under such patent deed or other writing, for which some other person has the better title, such adversary possession under such patent deed or other writing shall be taken and held to the boundaries embraced or included by such patent deed or other writing, unless the person having the better title, shall have actual adverse possession of some part of the land embraced by such patent deed or other writing." See *Oney v. Clendenin*, 28 W. Va. 35 (Syl. point 4); *Ketchum v. Spurlock*, 34 W. Va. 597, (12 S. E. 832); *Industrial Co. v. Schultz*, 43 W. Va. 471, (27 S. E. 255, Syl. point 5); *Garrett v. Ramsey*, 26 W. Va. 345; *Congroves v. Burdett*, 28 W. Va. 220, (Syl. point 1),—in the latter of which the law is thus stated: "Where there is a lap or interlock of two deeds whereby both embrace the land in controversy, and the person having the elder deed or the title to the land is in actual possession of a part of his land outside of the interlock, and the person having the junior deed or color of title is in the actual adverse possession of the interlock, or land in controversy, claiming under and to the limits of his deed, the latter will in contemplation of law be regarded as being

in the actual adverse possession of all the land in the interlock, not simply that actually occupied or enclosed by him." The same law would apply if the party holding the elder title was in possession claiming the interlock in the same manner. In view of the facts shown to have been proven in this cause, and considering the authorities above cited, my conclusion is that the circuit court erred in refusing to set aside the verdict of the jury. The judgment complained of is therefore reversed, the verdict set aside, and a new trial awarded.

Reversed.

CHARLESTON.

BOGGS' EXECUTOR V. HARPER'S ADMINISTRATOR.

Submitted Sept. 8, 1898—Decided Dec. 10, 1898.

1. DEATH—*Presumption of Death.*

A person who absents himself from his home, and is unheard of by those who, had he been alive, would naturally have heard of him, for seven years, will be presumed to be dead, and treated as such in any litigation in which he is concerned, in the absence of proof to the contrary. (p. 559).

2. VENDOR AND VENDEE—*Contracts—Sale of Land—Description—Records—Deficiency.*

Where a party, by an agreement in writing, contracts to sell a tract of land, describing it by a general local description, and as being the same land conveyed to him by a third party, the vendee has a right to look to the record for a description of the land; and if it there appears that the land is described by metes and bounds, and containing a certain number of acres, such vendor will be regarded as representing the land to contain the number of acres mentioned in said recorded deed. (p. 561).

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3. VENDOR AND VENDEE—*Contracts—Fraud—Sale of Land—Equitable Relief—Deficiency.*

Where a party, by written agreement, sells a tract of land at a specified price, upon an unqualified statement that it contains a definite quantity or specified number of acres, it will be held *prima facie* that the vendee was influenced to pay or agree to pay the price specified because of such statement; and if it is afterwards established that there is a deficiency in the quantity, in excess of what may be rightfully attributed to the usual inaccuracies in surveying, the vendor, in the absence of all other proof, will be presumed to have committed a fraud on the rights of the vendee by such statement of the quantity, and a court of equity will for this reason grant relief to the vendee for such deficiency. (p. 562).

4. VENDOR AND VENDEE—*Contracts—Sale of Land—Deficiency—Compensation.*

The general rule in such cases is that the compensation allowed for the deficiency in quantity shall be at the rate of the average price paid or agreed to be paid for the entire tract purchased. (p. 562).

Appeal from Circuit Court, Pendleton County.

Bill by John Boggs against Elijah Harper. Pending the suit, the parties died. A decree was rendered, from which Isaac P. Boggs, executor of the original complainant, appeals.

Reversed.

F. M. REYNOLDS, for appellant.

CHARLES P. JONES, for appellee.

ENGLISH, JUDGE:

By an agreement in writing, dated November 28, 1860, Elijah Harper contracted to sell to John Boggs certain tracts of land, namely, all the lands deeded to him by Philip Harper, Sr., deceased, lying on both sides of the North Fork, in Pendleton County, W. Va., for the sum of two thousand and eighteen dollars; and said Elijah Harper, on his part, bound himself, his heirs, etc., to make or cause to be made a good, lawful warranty deed, and free it of all incumbrance, giving peaceable possession of all the land, except the field seeded in grain on March 1, 1861, and possession of the dwelling house the 1st of April, 1861, all in the same order it then was, and possession of the seeded

field when the crop was off ; said deed to be made, and the above obligations complied with, on or before April 1, 1861. John Boggs paid in cash five hundred dollars, and after deducting the amount of vendor's lien on the land, which Boggs subsequently paid, a balance of five hundred and eighteen dollars was left, for which Boggs executed his single bill, dated November 28, 1860, payable October 1, 1861. In December, 1869, Elijah Harper instituted an action at law on said single bill. This suit was continued until October, 1876, when Boggs withdrew his defence to said action at law, reserving to himself all rights in equity; and a judgment was rendered against Boggs on said single bill for nine hundred and eighty-four dollars and forty-six cents, with interest from October, 1876. On December 25, 1876, said Boggs obtained an injunction to said judgment, on the ground that there was fraud and misrepresentation as to the quantity of land sold by Harper, and on the ground that there was a large deficiency in one tract of land described in one of the deeds from Philip Harper to Elijah Harper. The plaintiff, Boggs, in his bill, praying for an injunction, stated these facts, and also that some time in 1876 said Harper sued out an execution against him on said judgment, which was then in the hands of the sheriff; Also alleging that, at the time he purchased said lands, Elijah Harper represented to him that they consisted of four tracts,—one tract of one hundred and four, one of ten, one of forty, and the remaining tract twenty-eight acres,—which representations were false, but that they were relied on by him, and that it was by reason of these misrepresentations he was induced to purchase as aforesaid, especially the representation as to the one hundred and four acre tract; that this tract, instead of one hundred and four acres, contained only fifty-two acres; that said Harper did not have any title or right to more than fifty-two acres in the one hundred and four acre tract, nor did Philip Harper, Sr., have any title thereto; that on May 15, 1848, Reuben Harman and Joseph Lantz, executors, or Thomas Miller, deceased, conveyed to Jonas Miller and George Miller a tract of land of fifty-two acres on the North Fork, in Pendleton County, lying wholly within, and forming a portion of said one hundred and four acres; that

by a survey made by the county surveyor, it fully appeared that Harper or said Philip Harper, Sr., had no title to any portion of said one hundred and four acres, except that part not covered by said deed to Jonas and George Miller, above mentioned; and that the portion of said one hundred and four acre tract embraced in the Miller deed is of great value, to-wit, one thousand four hundred dollars, and if he had known that Elijah Harper had no title to, and could not have conveyed to him, that valuable portion of the one hundred and four acres, he would never have made the purchase; that, by reason of the defendant Harper's failure to convey him this valuable portion of said tract he has suffered damage to a greater amount than the judgment above mentioned; that he has never given plaintiff possession of said land, or at least, the most valuable portion thereof, and has never made him a deed for any part of said land.

Plaintiff further alleged that, at the time of said sale, said Philip Harper, Sr., had a vendor's lien on said land, to secure the payment of the purchase money still due on his sale to Elijah Harper; that in 1868 the executor of Philip Harper, Sr., brought a suit in equity to enforce said lien, and, under a decree in said suit, H. H. Masters, as special commissioner, sold said lands, at which sale the plaintiff became the purchaser, at the price of one thousand three hundred and sixty-nine dollars, and paid the money; that it was understood between plaintiff and the defendant and Harper at the time of said sale, that the vendor's lien aforesaid should be discharged by complainant, and that he should have credit for the amount thereof on said two thousand and eighteen dollars, but that, failing to get any deed for said land from Harper, he suffered a sale of said land under a decree of court, in order that he might receive some title thereto; that Harper left Pendleton County soon after the war, and has not yet returned, and it is not known where he resides; that, if compelled to satisfy said judgment, it would be impossible for him to be reimbursed for the loss sustained by Harper's failure to comply with his contract; that he only desired a good legal deed for all the land the defendant Harper sold and agreed to convey to him; and that, until such deed is made and

delivered, he should not be compelled to pay the balance of purchase money represented by the judgment aforesaid ; and he prayed that the sheriff of said county and Elijah Harper might be restrained by injunction from the collection, by execution or other process, of said judgment, and for general relief. An injunction was awarded as prayed for, and perfected. The bill was answered by D. G. McClung, administrator of Elijah Harper, deceased, denying that, at the time plaintiff purchased said land of Harper, he represented to said Boggs that it consisted of four tracts, containing, respectively, one hundred and four, ten, forty and twenty-eight acres; but, on the contrary, he alleged that on November 28, 1860, said Elijah Harper had all of his land put up for sale in gross at public auction, and employed Boggs to make the sale, and he cried it off to one Jonas Miller, who owned the adjoining land, at the price of two thousand and eighteen dollars for the whole, in gross, and not by the acre; that, after said Miller bought said land at said sale, he agreed that Boggs might take the land at the same price at which it had been knocked to him, and then said agreement was executed between Elijah Harper and plaintiff; that the fifty-one and three-fourth acres claimed by plaintiff was part of said one hundred and four acre tract, was highly improved, and had been in the possession of Jonas Miller and his heirs for seventy-five or one hundred years, and had on it a dwelling house only about forty yards from the line; that the sale of said land by said Harper to Boggs was in gross and not by the acre; that Boggs got all the land he thought he was buying, and that his knowledge thereof was nearly, if not quite, equal to that of Harper; that the land, exclusive of said fifty-one and three-fourth acres, was in 1850 worth more than Boggs agreed to pay for it; that it was then worth two thousand five hundred dollars or three thousand dollars, and he prayed that the injunction be dissolved. Depositions were taken, and among them that of John Boggs, the plaintiff, which was excepted to; and on November 12, 1894, the court sustained exceptions to the testimony of said Boggs in so far as related to transactions formerly had with said Harper, and leave was given plaintiff to take other depositions. On the 20th of April,

1897, the cause was finally heard, the injunction dissolved, and it was decreed that said McClung, administrator of Elijah Harper, deceased, recover against Isaac P. Boggs, executor of John Boggs, deceased, three thousand one hundred and seventy-two dollars and sixty-four cents, with interest from April 20, 1897, till paid, but directed that before any execution on said judgment should be issued, the widow of Elijah Harper, with her husband and Philip C. Harper, Job D. Harper, and John D. Harper, heirs of Elijah Harper, deceased, should file in the papers of the cause a sufficient deed, with general warranty, conveying said land to the heirs of John Boggs, deceased, which deed should be delivered when the amount therein decreed should have been paid. Isaac P. Boggs, executor, etc., thereupon obtained this appeal.

The second error claimed and relied on by appellant is as to the action of the court in sustaining the exception to the deposition of John Boggs, so far as it related to transactions with Elijah Harper, because there was no sufficient evidence that he was dead when said John Boggs was examined and his evidence taken. The deposition was taken on the 11th of August, 1877. At that time the whereabouts of said Harper had not been known for twelve years. His wife had married again. An administrator had been appointed of his estate, who filed his answer as such to plaintiff's bill, to which the plaintiff replied generally; and on November 12, 1894, the court sustained the exceptions to the deposition of said John Boggs so far as related to transactions held formerly with said Elijah Harper. In determining questions of this character where positive proof is lacking, the court is compelled to rely on presumption. At the time the deposition was taken, more than twelve years had elapsed, and, when the exception was sustained, nearly twenty years had passed, since Harper had been definitely heard from; and the court was well warranted in presuming him dead when the deposition was taken. In *Davis v. Briggs*, 97 U. S. 628, the Supreme Court held "that a person who for seven years has not been heard of by those who, had he been alive, would naturally have heard of him, is presumed to be dead; but the law raises no presumption as to the precise time of his death."

The same thing was held in *Evans v. Stewart*, 81 Va. 724. We also find that sections 44, 45, chapter 130, Code, provide that "if any person who shall have resided in this State go from, and do not return to, the State, for seven years successively, he shall be presumed to be dead in any case where his death shall come in question, unless proof be made that he was alive within that time." So, also, in *Hoy v. Newbold*, 45 N. J. Law, 219, it was held: "A person who absents himself from this state for seven successive years is presumed to be dead, and the party asserting he is living must prove it." See also, 1 Am. & Eng. Enc. Law, 37, and note. This case was continued from time to time, and frequent opportunities were allowed the plaintiff to overthrow the presumption that Elijah Harper was dead, but the proof was not forthcoming; and I conclude that the circuit court acted properly in excluding the testimony of Boggs as to transactions and communications had with said Harper.

Was this a sale in gross, or a sale by the acre? It appears from the evidence that the plaintiff was well acquainted with the land; that he sold it as agent of said Harper, at auction, to Jonas Miller, for two thousand and eighteen dollars, who agreed that said Boggs might take it off his hands at the same price and then the agreement in writing was entered into with Harper. At the time Boggs offered said land for sale at auction, he offered the four tracts together, and sold them in that way to Miller; and, when Miller consented to allow Boggs to take the lands at the same price, he contracted for the land with said Harper in the same way. Now, when the testimony of Boggs was excluded as to transactions and communications had with said Harper, there remained no evidence as to any representations made by him as to the quantity of land in either of said tracts; but, when we look to the title bond itself, we find that the land is therein described as "certain parcels of land, namely, all the lands deeded or conveyed to him, Elijah Harper, by Philip Harper, Sr., deceased, lying on both sides of the North Fork, in the county and state aforesaid, for the sum of \$2,018;" and said Harper bound himself and his heirs, etc., to make or cause to be made a good, lawful warranty deed, and free it of all incumbrance.

It appears from exhibits filed with the bill that on the 19th of January, 1860, Phillip Harper conveyed to said Elijah Harper a tract of land by metes and bounds, containing one hundred and four acres, less ten acres, which was admitted to record on the 10th of April, 1860, which deed fixes the number of acres in said so-called "104-acre tract" at ninety-four acres, which land was conveyed to Elijah Harper, with covenants of general warranty; and said Harper, in said title bond, by his warranty therein contained, must be considered as warranting the land described in said deed from Philip Harper to him, and thereby representing it to contain ninety-four acres; and, while said Boggs had an opportunity of informing himself as to the number of acres by reference to the deeds, yet it appears that as early as the 15th of May, 1848, Jonas Miller and George Miller acquired title to the fifty-two acres included within the boundaries of said ninety-four acre tract, which fact did not appear in any way on the face of the deeds from Philip Harper. So, Elijah Harper, by referring to the source of his title, represented the number of acres in the tracts of land sold. In the case of *Crislip v. Cain*, 19 W. Va. 441 (fifteenth point of syllabus), the Court held that "as the vendee of land has a right to rely on the statement of the vendor as to the number of acres in a tract of land which he sells, and naturally, does rely upon it, and as the quantity of land is generally a material matter in the purchase of a tract of land, it ought *prima facie* to be regarded that the vendee was induced to pay or agree to pay the price named in the contract or deed, because the statement in it by the vendor of the number of acres, which statement, if positive, should be regarded as a statement made on the personal knowledge of the vendor, and therefore, in the absence of all other proof, the vendor must be regarded as guilty of fraud on the vendee; and a court of equity should, for this reason, require the vendor to make a proportionate abatement from the purchase money." And, in point twenty of syllabus in the same case, the Court holds that "a court of equity has clearly jurisdiction to abate from the purchase money due from a vendee for the deficiency in such a sale of land by which the vendee was injured, through the fraud of the vendor in mis-

stating the quantity of the land in the face of the contract or deed or orally." Also, in the case of *Heavner v. Morgan*, 41 W. Va. 428, (23 S. E. 874), this Court held that "where a party, by his title bond, covenants to sell a tract of land with general warranty, describing it as containing a certain number of acres, and the vendee executed to him his bond for the purchase money, and it is subsequently ascertained that there is a material deficiency in the quantity of the land, and it further appears that the vendor is insolvent, a court of equity will not require such vendee to complete his purchase by paying his bonds, and to rely upon the hazard of recovering the money so paid from his insolvent vendor." Again in the case of *Kelly v. Riley*, 22 W. Va. 247, in the third point of syllabus, it was held that "where a person has made a sale of land in gross, at a specified price, upon an unqualified statement that it contained a definite quantity or specified number of acres, it will be held *prima facie* that the vendee was influenced to pay or agree to pay the price specified because of such statement; and, if it is afterwards established that there is a deficiency in the quantity in excess of what may be rightfully attributed to the usual inaccuracies in surveying, the vendor, in the absence of all other proof, will be presumed to have committed a fraud on the rights of the vendee by such statement of the quantity, and a court of equity will, for this reason, grant relief to the vendee for such deficiency." And in point four it was held: "The general rule in such cases is that the compensation allowed for the deficiency in quantity shall be at the rate of the average price paid or agreed to be paid for the entire tract purchased." To the same effect, see *Sine v. Fox*, 33 W. Va. 521, (11 S. E. 218).

The evidence in this case clearly shows that there was a deficiency in said ninety-four acre tract of fifty-two acres, which portion was held by an older and better title; and, applying the principles announced in the decisions above quoted to the facts of this case, I must hold that the circuit court erred in dissolving the injunction awarded in this cause, and that the estate of John Boggs, deceased, is entitled to an abatement in the purchase money, to be ascertained by multiplying said fifty-two acres of deficiency in

said land by the average price per acre of said ninety-four acre tract. The decree complained of is therefore reversed, and the cause remanded.

Reversed.

CHARLESTON.

CANN v. CANN'S HEIRS *et al.*

Submitted Sept. 10, 1898—Decided Dec. 10, 1898.

1. ADMINISTRATOR—*Statute of Limitations.*

The syllabus in the case of *Cann v. Cann*, 40 W. Va. 138, is approved. (p. 566).

2. APPEAL—*Defendants.*

Where adult defendants are negligent of their defense in the lower court, they cannot be heard in an appellate court. (p. 565).

3. COMMISSIONER IN CHANCERY—*Review on Appeal.*

A finding of facts by a commissioner, confirmed by the circuit court, is viewed with peculiar respect by this Court, and such finding will not be disturbed unless plainly erroneous. (p. 564).

4. STATUTE OF LIMITATIONS—*Accrual of Action.*

If an employer promise to make compensation for services at the time of his death, by will or otherwise, the statute of limitations does not begin to run until the death of such person. (p. 566).

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Appeal from Circuit Court, Morgan County.

Bill of Harrison Cann against Jacob Cann's heirs and others. From a decree for complainant, the heirs appeal.

Affirmed.

DANIEL B. LUCAS, for appellant.

W. H. TRAVERS and FAULKNER & WALKER, for appellee.

DENT, JUDGE:

This case was in this Court before (10 W. Va. 138, 20 S. E. 910), on an appeal from a decree sustaining an exception to a commissioner's report and dismissing the bill. This time it comes here on an appeal from a decree of the circuit court overruling exceptions to a commissioner's report, and confirming the same,—two entirely different conditions, governed by different principles of law. "Every presumption is made in favor of the correctness of the decision of the commissioner in chancery. If the testimony is conflicting, the court rarely interferes with his finding on the facts, provided he makes no error of law affecting the results." *Hartman v. Evans*, 38 W. Va. 670, (18 S. E. 810). And this is peculiarly so in this Court when such finding has been confirmed by the circuit Court. *Fry v. Feamster*, 36 W. Va. 454, (15 S. E. 253); *Reger v. O'Neal*, 33 W. Va. 159, (10 S. E. 375); *Handy v. Scott*, 26 W. Va. 710. The evidence is conflicting, and this Court is thereby limited to the question of law raised in the case. Most of these were settled by the former decision. The case was remanded to the circuit court to ascertain what sum, if any, the plaintiff was entitled to recover on a *quantum meruit*. The commissioner fixed the amount at five thousand eight hundred and seventy-four dollars, and the court confirmed his finding, and decreed accordingly. The heirs of Jacob Cann appealed. The bill is taken for confessed as to Sarah Cann, Catherine Ziler, and Emma Cann, adult defendants, who therefore have no standing in this Court, for they should have first made their defense in the lower court. As to them no proof of plaintiff's claim was necessary, under section 26, chapter 125, Code, which provides: "Every material allegation of the

bill not controverted by an answer * * * shall for the purpose of the suit be taken as true and no proof thereof shall be required." As to the infant defendants the bill cannot be taken as true, but when the proof is satisfactory to the commissioner and the circuit court the decree thereon will rarely be disturbed in their favor, they having reserved rights by statutory enactment until after they arrive at the age of majority. All this was plainly enough stated in the former decision to put the adult defendants on their guard, and gave them the opportunity of making any defense they might have against the plaintiff's demand. They made none. They are, therefore, without standing in this Court. The counsel appear to have misunderstood the former decision. The Court held that the due bill found written in Jacob Cann's account book, not having been delivered, or the contents thereof made known, was neither good as a note nor as a promise to avoid the statute of limitations, but, if held to be genuine, was admissible as evidence to establish a *quantum meruit*. The genuineness, while admitted to be doubtful was left open for further consideration by the lower court and its commissioner as evidence bearing on the question of *quantum meruit*. The fact that the adult defendants failed to answer denying the plaintiff's right of recovery weighs heavily in favor of the justice of plaintiff's demand. They were his sisters and should have been acquainted with the circumstances; and a legal admission by them is almost equivalent to positive proof or affirmation. As to themselves it certainly is so regarded by the law of pleading. So the only legal question presented is as to the statute of limitations, and this was virtually settled before. It does not begin to run until the right of action accrues. See first point in syllabus, *Cann v. Cann*, above. If this had been a claim for a sum to be paid annually, the right of action would accrue soon as the day of payment expired. Such is not the demand, but it is for the lump services of the plaintiff for about twenty years, for which he was promised compensation by deed or will, in real estate, a lump amount. While he cannot recover the real estate promised, if he has rendered the services in expectancy

thereof, the law will give him the true value of such services in lieu of such land in money. And as he labors in expectancy of such provision to be made by the will of his employer, he has no right to sue, and action does not accrue until after the death of his employer, unless he sooner repudiates the contract, for until such occurrence he may fulfill his promise; nor can it be known whether he has done so or not until the existence or non-existence of a will is ascertained. The opinion of JUDGE HOLT in the former case of *Cann v. Cann*, 40 W. Va. 154, (20 S. E. 910), is very full and satisfactory on this point, and is referred to and adopted as a part hereof as a true exposition of the law and careful collection of the authorities on this question. "Where a right depends upon some condition or contingency, the cause of action accrues and the statute runs only from the fulfillment of the condition or the contingency." 13 Am. & Eng. Enc. Law, 720. "On a promise to pay for services by will, the cause of action accrues at the employer's death." *Stone v. Todd*, 49 N. J. Law, 274, (8 Atl. 300). The decree complained of is affirmed.

Affirmed.

CHARLESTON.

CRUMLISH'S ADMINISTRATOR v. SHENANDOAH VAL. R. Co.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. SAME.

(Submitted Sept. 12, 1898—Decided Dec. 10, 1898.

RES ADJUDICATA—Admissions—Record.

If a party would be entitled to the benefit of a decree as *res judicata* to the prejudice of another afterwards make an admission of record in the case, inconsistent therewith, detracting from his right under said decree, and such admission is the truth, he cannot rely on such decree as *res judicata*. (p. 576).

Appeal from Circuit Court, Jefferson County.

Bills by H. H. Crumlish's administrator against the Shenandoah Valley Railroad Company and the Fidelity Insurance, Trust & Safe-Deposit Company against the same defendant. From a decree settling the accounts of one McDonald, receiver of an intervening creditor, he appeals.

Affirmed.

DANIEL B. LUCAS and A. W. McDONALD, for appellant.

F. P. CLARK, for appellee.

BRANNON, PRESIDENT :

It seems useless to write an opinion in this case, as it involves only the construction of a contract, and no legal principles of guidance to the public. But it is customary. The Shenandoah Valley Railroad was under a decree of sale for its indebtedness. A part of such indebtedness

was a recovery in the name of McDonald, receiver of the Central Improvement Company, against the Shenandoah Valley Railroad Company, amounting, February 10, 1891, to seven hundred and ninety-one thousand three hundred and thirty-eight dollars and nine cents; but that was subject to a prior lien. There was danger that the debt of the Central Improvement Company would be lost under the prior lien by failure of the railroad to sell for enough to pay both debts; and Moore, Lucas, and others, representing one hundred and twenty-eight thousand dollars out of one hundred and thirty-eight thousand dollars stock of the Central Improvement Company, made an arrangement with certain parties acting under the name of the Memphis & Atlanta Construction Company, to bid, at the coming sale of the road, a sum sufficient to pay the debt of the Central Improvement Company, and for making such bid agreed to pay said Memphis & Atlanta Construction Company one hundred and sixty thousand dollars. Afterwards, by a written contract, dated September 27, 1890, between Lucas, Moore, and McKeehn, attorneys for stockholders owning said one hundred and twenty-eight thousand dollars stock of the Central Improvement Company, of the one part and the Norfolk & Western Railroad on the other part, the said attorneys sold to the Norfolk & Western Railroad Co. for the consideration of five hundred thousand dollars, said one hundred and twenty-eight thousand dollars stock. The Norfolk & Western Company was already the owner of three hundred and sixty-two thousand one hundred and thirty-six dollars and forty-eight cents of three hundred and eighty-one thousand nine hundred and ninety-six dollars and seventy-one cents of the indebtedness of the Central Improvement Company. Thus the Norfolk & Western Company owned one hundred and twenty-eight thousand dollars out of one hundred and thirty-eight thousand dollars of the capital stock of the Central Improvement Company, and three hundred and sixty-two thousand one hundred and thirty-six dollars and forty-three cents indebtedness against it. By said agreement the Norfolk & Western Company agreed to purchase at the coming sale of the Shenandoah Valley Railroad at a price large

enough to cover the claim of the Central Improvement Company, and it did later buy the property, and paid to McDonald, receiver, fifty thousand dollars, retaining in its hands the balance of the sum for which it purchased the property, it being thought by the parties useless to require the Norfolk & Western Company to pay the full amount, since it owned the bulk of the stock and of the indebtedness of the Central Improvement Company; and, if it had paid the whole, it would be decreed at once back to it on account of its ownership of debts and stock. After these transactions, Scott, Jewett, and McFadden, claiming to be owners of the stock of the Central Improvement Company, came into this litigation asking to be permitted to participate in the fund going to the Central Improvement Company as such stockholders, and the litigation touching them resulted in the disallowance of the claims of Scott and Jewett as stockholders, and the allowance of the claim of McFadden to the extent of four one hundred and thirty-eighths of the stock. This will appear from a former decision of this Court in this case, found in 40 W. Va. 627, (22 S. E. 90), where facts will more at large appear. Some time after the agreement of September 27, 1890, when the Norfolk & Western acquired the one hundred and twenty-eight thousand dollars stock of the Central Improvement Company, and before our said former decision, the Norfolk & Western Company bought in from Hunt and Hilliard six thousand dollars of stock of the Central Improvement Company, and was thus the owner of one hundred and thirty-four thousand dollars of the one hundred and thirty-eight thousand dollars total stock. McFadden owning four thousand dollars. When the cause went back to the circuit court, an order was made referring the cause to a commissioner, to settle the accounts of McDonald, receiver, and upon his report a decree was entered requiring him to pay, as the balance in his hands, twenty-two thousand nine hundred and forty-seven dollars and ninety-four cents, and from this decree McDonald appealed.

McDonald complains that the circuit court rejected certain credits claimed by him. I shall therefore take them up for consideration. One is the sum of eleven thousand

five hundred and ninety-four dollars and twenty cents, claimed by the receiver as paid McDonald, Moore, and Lucas, attorneys, as ten one hundred and thirty-eighths of the one hundred and sixty thousand dollars expended in procuring the Memphis & Atlanta Company to make the by-bid above spoken of. The Court in 40 W. Va. 627, (22 S. E. 90), held said one hundred and sixty thousand dollars to be a proper expenditure so as to enable those stockholders of the Central Improvement Company who incurred the expenditure to charge other stockholders outstanding, and not concurring in the expenditure, with a portion thereof, conforming to the amount of their stock. It expressly decreed that McFadden should be charged therewith. The question, then, is, did the court properly reject the said credit of eleven thousand five hundred and ninety-four dollars and twenty cents so paid by McDonald for the portion of the one hundred and sixty thousand dollars as chargeable to the Hunt and Hilliard stock and the McFadden stock? It is claimed that our former decision, holding that outstanding stock should be charged to contribute to pay said one hundred and sixty thousand dollars is *res judicata*, and concludes the question in favor of the said credit. It clearly would compel Hunt and Hilliard, if they yet owned the stock, to pay their portion, but the Norfolk & Western Company owned the stock at the time of our decision. That decision was in a contest between the stockholders of the Central Improvement Company—that is, the Norfolk & Western Company, as purchasers of the one hundred and twenty-eight thousand dollars stock, and Scott, Jewett, and McFadden, who were outstanding stockholders, not consenting to the expenditure of the one hundred and sixty thousand dollars—as to whether said outstanding stockholders should be let in as stockholders, and, if so, whether they should be charged with a portion of the one hundred and sixty thousand dollars; whereas we now have in hand a contest between the Norfolk & Western Company and those parties who acted as attorneys, selling to it one hundred and twenty-eight thousand dollars stock of the Central Improvement Company, under the contract of September 27, 1890, as to whether they

shall charge against the Norfolk & Western Company a portion of the one hundred and sixty thousand dollars; whether the receiver could pay them, and get credit for so doing. It is not, therefore, *res judicata* as to this credit. The question now is upon a settlement between receiver and depositor. The question then was not, shall the Norfolk & Western Company, as owners of the Hunt and Hilliard stock, be charged with contribution to reimburse the expenditure? but that is the question now. The decision would not bind Hunt and Hilliard. Though they had sold their stock to the Norfolk & Western at the date of the former decree; yet what that company should pay for such contribution on the Hunt and Hilliard stock, or whether anything, was not an issue, and was not decided. The said contract of September 27, 1890, was then in evidence in the case, but its construction was not in issue. Its construction, as between the parties to it, was not passed on. I did say in argument that I did not think that contract forbade those stockholders who paid one hundred and sixty thousand dollars from charging other stockholders with contributions, but I said nothing as to the rights under that contract of the parties to it between themselves. We are thus called on to construe that contract. By it Lucas, Moore, and McKeehn, attorneys for certain stockholders of the Central Improvement Company, sold, for five hundred thousand dollars, one hundred and twenty-eight thousand dollars of the one hundred and thirty-eight thousand and dollars stock of that company. Now, after this sale I take it that these attorneys or stockholders could not have maintained any suit to demand of the Norfolk & Western Company any part of the one hundred and sixty thousand dollars; nor could they have maintained any suit against Hunt and Hilliard, nor against McFadden, for their right on account of having paid that one hundred and sixty thousand dollars was not such as could constitute the basis of a suit. True, if they had remained stockholders, and Hunt and Hilliard or McFadden had applied for admission as stockholders to the fund going to stockholders, they could have compelled them, as a condition of admission, to abate from their stock its ratable contribution to reim-

burse those stockholders who had incurred the outlay; but they had sold their stock to the Norfolk & Western Company. Had they any longer any right to demand anything of Hunt and Hilliard? Their right as stockholders had passed to the Norfolk & Western Company, and, if anybody had right to demand contribution, that company had, as purchasers of the stock. I do not see that, after such sale, those former stockholders had any longer any right under their expenditure of the one hundred and sixty thousand dollars. The Norfolk & Western Company acquired the Hunt and Hilliard stock after the sale of the one hundred and twenty-eight thousand dollars stock to the Norfolk & Western Company, and it seems to me that thereafter there remained not a vestige of demand which could be set up by those stockholders who had sold against Hunt and Hilliard or the Norfolk & Western, their assignee. So much for the force of the mere sale itself. But, in addition to the mere force of the sale itself, let us consider other positive provisions of the contract of September 27, 1890. By its fourth clause the said sellers of the stock became responsible for all prior costs in the litigation, "and the counsel and receiver in these cases agree to relinquish all claims for fees or commissions, except such as is paid them out of the \$500,000 they may now or they may hereafter have for fees or compensation of any nature;" and one of the attorneys agreed to continue in the litigation for the Norfolk & Western without further pay. Does not this mean that the sellers would not hold the Norfolk & Western Company, their vendee, responsible for any further demand for fees, commissions, or "compensation of any nature?" This broad language evinces a purpose to sell the Norfolk & Western all their interest and rights outright when they sold the stock. The words "compensation of any nature" would seem aptly to fit the demand for compensation for the money they had paid out in the expenditure of one hundred and sixty thousand dollars. At any rate, the language and spirit of the contract manifest a purpose to sell all their interest outright to the Norfolk & Western Company, free of further demand from them. It seems neither equitable nor within the let-

ter of this stipulation that they should now demand of the Norfolk & Western Company a large contribution on account of the Hunt and Hilliard stock, afterwards acquired by it. I think they are estopped by the very meaning of that contract. All their rights were embodied in the consideration paid for this stock. That was to pay them in full. The writing breathes and speaks this meaning.

Appellant McDonald also complains that the court below rejected a credit claimed by him of eight thousand six hundred and ninety-five dollars and sixty-two cents, as paid himself (McDonald), Moore and Lucas, attorneys,—the portion of the two hundred thousand dollars attorneys' fees, charged upon the six thousand dollars, of the Hunt & Hilliard stock acquired by the Norfolk & Western Company after agreement of September 27, 1890. I need say nothing further as to this item than what I have said above. The fourth clause relinquishes all claim to attorneys' fees. The former decision of this Court as to the McFadden stock denied the right to charge it for its fractional share of two hundred thousand dollars, and directed that it be charged only with a reasonable sum; and how, under that ruling, the receiver could pay those attorneys, he being one of them, six one hundred and thirty-eighths of two hundred thousand dollars for attorneys' fees against the Hunt and Hilliard stock, I cannot see. If charged at all, it would only be a sum fixed by the circuit court, as held in said former decision; and it has refused to allow anything, and properly so, because these attorneys relinquished all claim of further fees against the Norfolk & Western Company by said agreement. The Court decided in 40 W. Va. 627 (S. E. 90), that stockholders whose stock was held by the attorneys and sold to the Norfolk & Western Company could charge other stockholders with a fair sum for attorneys' services, but we did not decide that the attorneys could charge the Norfolk & Western Company for attorneys' services rendered on stock then bought by it from them, or on stock which it might acquire from others. The rights of the parties under that agreement were not before the court. It was only said that it did not debar those stockholders who had paid attorneys' fees

from claiming from other stockholders contribution therefor. So far that contract was construed, but no further. Whether it debarred the attorneys from claiming fees against their vendee, the Norfolk & Western Company, was not before us. And then, again, this receiver had no right to pay this sum to himself and others without specific orders from the court. We agree with the circuit court in denying this item of eight thousand six hundred and ninety-five dollars and six-two cents.

We also agree with the circuit court in denying the credit of seven hundred and thirteen dollars and fifty-six cents, his receiver's commission on the Hunt and Hilliard stock. The reasons are (1) McDonald was a co-attorney with Lucas and others, and as an individual knew all and assented to the whole agreement whose fourth clause relinquished commissions. (2) He signed a memorandum on the said contract of September 27th, 1890, binding him to become jointly responsible with other parties of its first part for the guaranty of the fifth article, and thus knew of and assented to the fourth clause. He thus became a party to it. The clause says that "the counsel and receiver in these cases agree to relinquish all claims for fees and commissions." What receiver? None other than McDonald. What counsel? None other than he and others, his associate counsel. It estops the receiver and attorneys from claim for receiver's commission and attorneys' fees. It is in the case, and we must give it effect thus far.

For similar reasons we agree with the circuit court in disallowing credit for two hundred and eighty-nine dollars and eighty-four cents, receiver's commissions on McFadden's stock.

We agree with the circuit court in disallowing credit for ten dollars for copying petitions for Scott and Jewett's appeal, and sixteen dollars and fifty cents for a copy of JUDGE BRANNON'S opinion. We see no need of them such as to charge the fund. The receiver was not called upon to defend the claim of Scott and Jewett, and, if he wanted these documents to use for himself and other attorneys, they are not chargeable to the fund.

Having disposed of the objections to the decree made by appellant McDonald without finding any error, I come to complaints against it made by the Norfolk & Western Company. It claims that the sum of six thousand six hundred and forty-six dollars and two cents, paid by the receiver to satisfy the McFadden recovery, should not have been allowed McDonald. The former decree entitled McFadden to it as against the Norfolk & Western Company, and it was right to pay it out of the fund. The Norfolk and Western Company claims that by reason of clause five of said contract of September 27th, McDonald cannot be credited this six thousand six hundred and forty-six dollars and two cents, as by it Moore, McKeehn, McDonald, and Lucas indemnified the company against the appearance and allowance of any outstanding stock not participating in the agreement. This fifth clause says: "The parties of the first part further agree to, and do hereby, indemnify it against any demands which may be established against it before any court by reason of this agreement at the suit of any holders of stock in said Central Improvement Company who are not represented by the parties of the first part." We have concluded that as Lucas, Moore and McKeehn are not in any way parties to this clause, and McDonald not as an individual, we cannot construe that fifth clause, or say what are the rights or obligations of any of the parties under it. We could not decree against McDonald on it in this case, because it is not involved in the pleadings, and we could not decree against him, or fix any liability on him, without Lucas, Moore and McKeehn as parties. Therefore the question whether the Norfolk & Western has the right to hold them responsible under it to indemnify it because of the allowance of the McFadden stock or the Hunt and Hilliard stock is left open for another suit or proceedings, if any shall be instituted, without prejudice to any party from this decision. Hence we cannot reverse the circuit court's action in allowing McDonald, as receiver, credit for said six thousand six hundred and forty-six dollars and two cents.

The Norfolk and Western complains that McDonald was allowed credit as receiver for one thousand and one hun-

dred dollars as paid for attorneys' fees to himself, Lucas and Moore for attorneys' fees charged for the McFadden stock. We think it was improperly allowed, because waived by said fourth clause. It was right to abate it from McFadden, but its abatement inured to the benefit of the Norfolk & Western Company.

In view of the contention of the attorneys for the Norfolk & Western Company that a decree of September 28, 1893, is *res judicata*, and that McDonald must be chargeable by it, it may be proper to refer to this subject. That decree, upon the admission of McDonald that there was in his hands, as receiver, sixty-one thousand nine hundred and forty dollars and three cents, directed that McDonald pay out of it certain costs, and then pay to the Norfolk & Western Company one hundred and thirty-four one hundred and thirty-eighths of the residue, which would amount as claimed, to fifty-nine thousand and sixty-three dollars and forty-one cents. I feel the force of the argument of *res judicata* made by the counsel; but the truth is that that result was attained by a statement made by a commissioner, which has not been further acted on in the case, based on the debit charged to the receiver of the whole purchase money for which the Norfolk & Western Company purchased the railroad; whereas the truth is that no money but fifty thousand dollars ever went into McDonald's hands, as I have above stated, and the Norfolk & Western Company made the solemn admission in the subsequent decree of November 5, 1896, that the sum paid McDonald, out of which that company was asking a decree against him, was fifty thousand dollars, and therefore I think this binds the company, and breaks the force of the argument of *res judicata*. Anyhow, it is just to charge McDonald with only fifty thousand dollars. As the company was the party retaining the money, and was allowed to do so at its request, it would be against equity to allow it with all the money over fifty thousand dollars in its pocket, to charge McDonald more than he received. It asked to retain all over the fifty thousand dollars, and, if we tolerate this argument of *res judicata*, and compel McDonald to pay beyond fifty thousand dollars, we would allow

the Norfolk & Western Company to recover for money which it itself retained. It is estopped from so doing by its own act. The true balance due from Receiver McDonald was twenty-four thousand and twenty-two dollars and ninety-four cents, on December 14, 1896, the date of the circuit court's decree, instead of twenty-two thousand nine hundred and twenty-two dollars and ninety-four cents as found by said decree.

NOTE BY DENT, JUDGE :

I concur in the conclusion reached in this case, but not with portions of the argument contained in the opinion in so far as it is an attempt to construe the provisions of the bond of indemnity given by Lucas, Moore, and McKeehn, and indorsed by McDonald. Such bond has never been brought before the Court on an issue or pleadings, nor have the parties thereto been summoned and impleaded in any manner. The bond was introduced as a mere incidental part of the evidence. The present litigation is narrowed down in fact as being between the Norfolk & Western Railroad Company on the one side and Charles McFadden on the other. As between the company and its guarantors at present there is no litigation pending and it is improper and *coram non judice* now to decide, as between them, as to who is entitled to the *pro rata* contributions of the receiver's commissioners' and attorneys' fees, and the one hundred and sixty thousand dollars by-bid expenditure. The company should be allowed to retain them with all ultimate legal rights thereto reserved. If they are covered by the bond of indemnity, this leaves them where they properly belong ; and, if not, and other persons, not parties to the cause, think they are entitled to them, and that they can recover them notwithstanding the bond of indemnity, they should be at liberty to do so ; and not being before the court properly, they are not bound by a judicial determination made in their absence. The decree of the 13th December, 1895, should be so modified as to allow the one thousand one hundred dollars attorneys' fee deducted from Charles McFadden to remain under the control of the Norfolk and Western Company, along with Hunt and Hilliard and other fees. If the attorneys or receiver deem themselves entitled to them notwithstanding their bond of indemnity, they have their action at law ; and if the Norfolk & Western Railroad Company deems itself entitled to recover from its indemnifiers the amount paid Charles McFadden, or for the Hunt and Hilliard stock, it has its remedy on its bond. And

“Let the poet resume his pen,
And prove himself the best of men.”

Affirmed.

CHARLESTON.

HEBB v. CAYTON.

Submitted Sept. 15, 1898—Decided Dec. 10, 1898.

1. MANDAMUS—*Elections by the People—Board of Canvassers—Recount.*

Mandamus lies to compel a board of canvassers canvassing returns of an election to recount the ballots between competing candidates for office on the demand of either, when they refuse such recount. (p. 579).

2. ELECTIONS BY THE PEOPLE—*Recount.*

A candidate asking a recount of ballots need not assign errors in the first count, or give any reason for a recount. (p. 580.)

3. ELECTIONS BY THE PEOPLE—*Recount.*

Where ballots once recounted as between candidates for one office are again sealed up, that will not debar a candidate for another office from demanding a recount as to the office for which he was a candidate. (p. 580).

4. MANDAMUS—*Practice—Rule—Petition—Answer.*

Where upon a petition for a *mandamus* a rule to show cause why the writ should not issue is awarded, instead of a *mandamus nisi*, and there is no answer to the rule raising an issue of fact, there need be no writ of *mandamus nisi*, and a peremptory writ issues; but where there is an answer raising an issue of fact, a *mandamus nisi*, embodying the facts justifying the *mandamus*, must be awarded, and it is treated as the declaration. (p. 581).

Error to Circuit Court, Tucker County.

Mandamus by Charles M. Hebb against the county commissioners of Tucker County as a board of canvassers. A peremptory writ issued, and William M. Cayton brings error.

Affirmed.

45	578
47	518
46	578
448	280
45	578
655	602
45	578
56	14
45	578
65	26

W. B. MAXWELL and C. WOOD DAILEY, for plaintiff in error.

DAYTON & DAYTON and FRED. O. BLUE, for defendant in error.

BRANNON, PRESIDENT:

Charles M. Hebb and William M. Cayton were candidates for the clerkship of the county court of Tucker County at the election in November, 1896. While the commissioners of the county were in session as a board of canvassers canvassing the returns of the election, Hebb demanded a recount of the ballots for that office, which, being refused, he asked and obtained from the circuit judge a *mandamus* to compel such recount, and Cayton sued out the writ of error we now decide. It is urged before us that *certiorari*, not *mandamus*, is the proper remedy. The action of canvassers in counting or recounting ballots is purely a ministerial act, one which the law commands them to do, *Brazie v. County Com'rs*, 42 W. Va. 213; *Marcum v. Commissioners*, 42 W. Va. 263, (26 S. E. 281). They have no choice to do or not do it, under proper circumstances. At common law, if having entered upon a count or recount, they commit any error, it is to be corrected by *certiorari*, not *mandamus*, as *mandamus* is not an appellate process. It does not lie to direct the inferior tribunal how to decide, but only to compel it to act when it refuses to act at all. *Board v. Minturn*, 4 W. Va. 300; *State v. County Court*, 33 W. Va. 589, (11 S. E. 72); *Miller v. County Court*, 34 W. Va. 285, (12 S. E. 702); *Railroad Co. v. Paull*, 39 W. Va. 142, (19 S. E. 551). So the statute giving right to Hebb to demand the performance of this ministerial act *mandamus* is the proper remedy at common law. But, even if the act of recount were not ministerial in character, as chapter 25, Acts 1893, amending section 89, chapter 3, Code, 1891, provides that "any officer or person upon whom any duty is devolved by this chapter may be compelled to perform the same by *mandamus*," it would clearly warrant the use of *mandamus* in this case. Indeed, we held in *Marcum v. Commissioners*, 42 W. Va. 263, (2 S. E. 6

281), that it gives *mandamus* in matters under the election law more scope than at common law, making it applicable to such matters, whether ministerial or judicial; in other words, giving it the appellate function of *certiorari*. One excuse made for the commissioners in refusing Hebb's request for a recount is that they had made a recount in one district of the county between two candidates for justice, and those ballots had been again sealed, and the commissioners did not think they had the right to reopen them. A strange proposition indeed,—that because ballots of one district had been sealed after a recount between district officers, this should forbid their recount in an election between candidates for county or other officers. Strange that such sealing of ballots is a burial without resurrection to answer the loud call of public justice. And for such a proposition language of JUDGE SNYDER in *Chenoweth v. Commissioners*, 26 W. Va. 230, is cited. He said only that after one recount the *same* candidate could not have another, carefully limiting his meaning to the *same* candidates. Those ballots, though sealed, are there to ascertain the true result of the popular verdict as to any and all candidates voted for; to correct mistakes at the precincts. But in truth the ballots had not been actually sealed again; for the commissioners certify that while yet they were considering a ballot in the justices' recount, "and before the ballots cast in said district were resealed and the result declared, but after the ballots had been counted, the result ascertained, the ballots tied up, and were being sealed," Hebb asked the recount. The plea that there could be no recount after sealing because the ballots might be tampered with in the meantime, can in this case have no force, because they had not left the hands or eyes of the commissioners. If resealed, the mere possibility of fraud does not stifle their verdict.

It is said Hebb gave no reason for a recount,—specified no error in the first count. How could he specify? He wanted the officers of the law to examine them for error. He did not have to assign errors. He is supposed never to have seen the ballots to be able to do so. The statute gives absolute right to demand a recount, without giving any reason.

The circuit judge awarded a rule to show cause why a *mandamus* should not issue, and did not award a formal *mandamus nisi*, or, as it is commonly called, an alternative *mandamus*; and it is said that, treating this rule as an alternative writ of *mandamus*, it does not show cause for such writ. One reason given is that it recites that Hebb demanded a recount before the result had been declared, and that till then he could not do so. The statement in the rule that a "recount" was demanded implies that the ballots had once been counted; and we should not unreasonably presume that when the demand was made there had as yet been no first count. We are to understand that a table had been prepared showing result. Hebb did not wait for a formal declaration of result, as the Code says that, "after canvassing the returns the board" shall recount the ballots, if demanded. The only declaration of the result of the election—that is, legal declaration—is that made after canvass, and after recount, and entered of record. Code 1891, c. 3, s. 69. It might be said that it is too late to ask a recount after this entry of record; but it cannot be said that it may not be demanded before such declaration. Technicality going so far should not be tolerated.

It is next insisted that no peremptory *mandamus* should have issued because no alternative *mandamus* was issued, and that under *Fisher v. City of Charleston*, 17 W. Va. 596, it is improper to substitute the petition or rule, or either of them, in lieu of the alternative writ, and no issue should have been made upon an answer to the rule. That is true when there is an answer to the rule raising an issue of fact; but there was no such answer in this case,—only a demurrer to the rule. The settled law is that when, as is often the case, a rule to show cause why a *mandamus* should not issue is awarded in the first instance, instead of an alternative *mandamus*, and there is no answer to the rule raising an issue of fact, and that rule and the petition state facts warranting a peremptory *mandamus*, such peremptory *mandamus* at once issues upon the rule without an alternative *mandamus*. This is well settled. Merrill, Mand. s. 252; *Fisher v. City of Charleston*, 17 W. Va. 596,

(Syl. point 1). Where the use of an alternative *mandamus* when no answer raising an issue of fact is presented? If the petition show *prima facie* cause for *mandamus*, and it is not rebutted by fact, of course the *mandamus* peremptory should issue. High, Extr. Rem. s. 504. Moreover, Cayton demurred to that rule, treating it as if a *mandamus nisi*, and it does not lie with him to demand in this Court an alternative writ.

It is further objected that the peremptory *mandamus* goes further than the rule; that, whereas the rule only requires the commissioners to assemble and recount the votes, the peremptory writ requires them to recount the ballots between these candidates, and, in addition, declare the true result according to the recount, and issue proper certificate of election. Now, it is true that the command inserted in the alternative writ of *mandamus* must be strictly followed in the peremptory writ, and the command therein cannot be varied or modified from the alternative writ. This addition does not vary or modify the rule in legal view, as the command to recount would be enough both in the rule and peremptory writ, since it would follow as a legal duty that, after the recount, the board should declare the result, and issue a certificate. This is not the case of a command to do one thing in the rule or alternative *mandamus*, and to do another thing in the final writ. The addition to the final writ complained of was only to do what the court ought to do without the command made by that addition. The peremptory writ commands a recount of the ballots between the parties for the office of "county clerk" of Tucker County. It is said there is no such office, and that this is a fatal defect of the peremptory writ. Very, very technical this is. In common parlance, "county clerk" means "clerk of county court," but everything else in the record, petition and rules and ballots, and the names of the candidates on the ballots, show that these parties were voted for, for clerk of county court. Although the petition is not a pleading so the defects therein can be a ground to quash it, yet, under *Doolittle v. County Court*, 28 W. Va. 158 (Syl. point 3), the petition may be looked to for the cure of an alternative

writ of *mandamus*. In addition, there was the rule that was part of the record and it was right in this respect. The final writ stood upon it.

It may not be out of place to emphasize as a matter of practice what has often been held in this Court: that the better practice is, when a petition for *mandamus* is filed, to award an alternative writ of *mandamus*, stating all the facts therein calling for a *mandamus*, as would be stated in a declaration; for this alternative writ is treated as a declaration in the action called *mandamus*. It is not necessary to issue a rule; for, where matters of fact come in an answer to it, it necessitates an alternative *mandamus*, and after that a peremptory *mandamus*, making three processes or awards instead of two. There is no use of a rule. The alternative writ should be resorted to in the first instance. *State v. Long*, 37 W. Va. 266. (16 S. E. 578.) I cite, also, the article "*Mandamus*" in that great work, *American & English Encyclopædia of Pleading & Practice* (volume 13, p. 767). The article is almost an entire treatise on this important remedy. It seems to me that Hebb was denied, without any reasonable justification, of a plain right, as a citizen, under the law of the land, to have a recount of the ballots. We affirm the judgment.

Affirmed.

CHARLESTON.

HURXTHAL'S EXECUTRIX v. HURXTHAL'S HEIRS *et al.*

Submitted Sept. 24, 1898.—Decided Dec. 10, 1898.

1. RIPARIAN LANDS—*Deed—Covenants—Liens—Priority of Liens.*

Where a party to a deed agrees to pay to the other party the sum of seventy-five dollars per annum for keeping up a certain dam, necessary to the mill property of the obligor, and that the obligation to pay the same, in addition to being a personal one, "shall be a covenant running with the land, and binding upon the Ronceverte Flour Mills, race, and water power, into whosoever hands they may pass," he thereby creates a lien on such mill property, which, duly recorded, has priority over subsequent liens. (p. 585).

2. MORTGAGE—*Chattel Mortgage—Machinery—Removal of Machinery.*

If machinery under mortgage is placed in a mill already mortgaged, it becomes subject to the realty mortgage, to the extent that is necessary to keep the security thereof unimpaired. So far as the personalty mortgage is concerned, if such machinery is mortgaged to its full value, and it will not damage the mill property by its removal, the mortgagee or purchaser may remove the same; otherwise, he must make good the damage caused by such removal. (p. 586).

3. MORTGAGE—*Chattel Mortgage—Judicial Sale—Machinery.*

When a mill and its machinery are subject to separate mortgages, and are sold under decree of court, they should be offered for sale both separately and together, and then sold in whichever way they will bring the larger sum. (p. 587).

Appealed from Circuit Court, Greenbrier County.
Suit between the executrix and the heirs of Ben Hurx-

45	584
46	16

45	584
53	91

45	584
165	112

thal, deceased, and others. A decree was rendered from which an appeal was taken.

Reversed in Part and Modified.

JOHN W. HARRIS, for appellants.

L. J. WILLIAMS, for appellees.

DENT, JUDGE :

In the case of Josie M. Hurxthal, administratrix, against Christine H. Hurxthal, on appeal from the circuit court of Greenbrier County, two questions are presented to this Court:

1. Whether the following provision in a deed duly recorded creates a lien on the property involved, in favor of the St. Lawrence Boom & Manufacturing Company, to-wit: "That the said party of the second part agrees to pay to said party of the first part the sum of seventy-five dollars per annum, to be paid on the first day of January in each year; and the obligation to pay the same shall, in addition to being a personal one, be a covenant running with the land, and binding upon said Ronceverte Flour Mills, mill race, and water power, into whosoever hands they may pass?" This question is fully met and determined in favor of the lien in the case of *Parsons v. Association*, 44 W. Va. 335, (29 S. E. 999). The appellant's claim for this charge at the date of the allowance thereof, to-wit: November 1, 1897, amounting to the sum of three hundred and twenty-four dollars and seventy-five cents, should have been decreed as a lien fourth in priority on said property.

2. Whether the court erred in holding that Nelson White, appellee, by virtue of a deed of trust executed thereon prior to its being fixed in the mill in controversy, held a lien on the machinery prior in right to the lien of the appellant Bryanna Hurxthal, secured to her by a prior deed of trust on the mill property? The authorities on this subject widely differ. The true equitable rule is stated in the case of *Binkley v. Forkner*, 117 Ind. 176, (19 N. E. 753), to-wit: "A chattel mortgage is effectual to preserve the character of the mortgaged chattels, as against a mortgage on the realty executed prior thereto, if the chattels can be re-

moved without injuring or impairing the value of the real estate, or the buildings thereon. If the detachment would occasion some diminution in the value of the realty, as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case." This rule is said to be firmly established in the interest of trade. That the realty mortgagee's security is kept whole is all that he can ask, as against the property of third parties. When the mortgaged personal property is attached to the realty, the mortgagor has only an equity of redemption therein, to which the mortgage on the realty at once attaches. *Campbell v. Roddy*, 44 N. J. Eq. 244, (14 Atl. 279); *Eaves v. Estes*, 10 Kan. 314; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 377; *Sword v. Low*, 122 Ill. 487, (13 N. E. 826). In the present case, Bryanna Hurxthal had a lien on the mill property amounting to about five thousand dollars, the mill being fitted up with the old burr system when the proprietor purchased of Nelson White the machinery in controversy, giving him a deed of trust thereon, and then placed it in the mill in lieu of the old system, so far as the flour part thereof is concerned, while he continued the burr system as to the corn and feed. The mill had to be changed some to suit the new machinery or roller system. What became of the old machinery is not shown in the evidence, unless it was retained for the corn and feed part. No damage is shown on account of the change. It is claimed the removal of the machinery will damage the mill. To what extent, there is no evidence. Nor can it be ascertained, until sale is effected, that the equity of redemption in the machinery is of any value. It devolves on the mortgagee to identify the property covered by his lien. If he is unable to do so, he cannot have the benefit thereof. This is admitted by his counsel. The court in its decree provided that the "special commissioners, or the one acting, shall sell the said machinery named and set forth in the said deed of trust, except said Case Purifier, on the same terms as the real estate, with privilege to the purchaser to remove the said machinery from the mill building with as

little damage thereto as possible." This decree does not protect the realty mortgage from the damage that may accrue from a separate sale of the properties involved. The machinery and the mill may both bring a better price, if sold together; and the mill may be greatly damaged, or may be benefitted, by the removal of the machinery. The court should have directed the commissioner to offer them for sale both separately and together, and sell in the way in which they would bring the larger sum. If together they bring a larger sum than when offered separately, the difference between the two sums will show the amount to which the realty mortgagee would be damaged by a separate sale, while the personal mortgagee would be only entitled to what the personal property would bring if sold separately, because such is the extent of his mortgage. If they sell for more separately, it will show the extent of the damage they are to each other; while, if the mill should sell for less separately than when sold in connection with the machinery, it will show to what extent the removal of the machinery causes loss to the realty mortgagee, who is entitled to be made whole out of the personalty; otherwise, she would be damaged by the removal of the machinery without recompense, contrary to the law as before settled.

The decree complained of will be reversed in so far as it fails to allow the St. Lawrence Boom & Manufacturing Company its lien for the sum of three hundred and twenty-four dollars and seventy-five cents, fourth in priority on said mill property, and amended so as to direct the special commissioners, in making sale of such mill property, to offer the same as a whole, and also the mill and machinery separately, and to sell the same in whichever way it will bring the largest sum; and in all other respects it is affirmed, and the cause is remanded for further proceedings. Bryanna Hurxthal, not having asked for the sale of the property as a whole in the circuit court, but asking it for the first time in this Court, will pay the costs of this appeal.

Reversed in Part and Modified.

CHARLESTON.

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MIDDLE STATES LOAN, BUILDING AND CONSTRUCTION CO. v.
ENGLE *et al.*

Submitted Sept. 10, 1898—Decided Dec. 10, 1898.

1. ASSUMPSIT—*Guaranty—Loan—Chattel Mortgage.*

Assumpsit will lie on a writing under seal guarantying repayment of money borrowed evidenced by borrower's bond, and secured by collateral mortgage which is to be repaid in monthly installments and payment of monthly dues on stock, and providing that, after six months' default in monthly payments, at option of the lender the principal debt shall at once become due and collectible and the mortgage foreclosed, when default has been made and mortgage foreclosed in a court of competent jurisdiction having jurisdiction of the subject-matter and parties, and a decree ascertaining the balance due after subjecting all the property embraced in the mortgage on account of the debt. If the insolvency of the principal debtor be alleged. (p. 692).

2. GUARANTY—*Chattel Mortgage—Guarantor's Liability—Insolvency.*

The contract of a guarantor is collateral and secondary, and when he guaranties the payment of a bond secured by collateral mortgage referred to in the bond he is not liable upon his guaranty until resort has been had to the mortgage, also to the bond, for the collection of the moneys secured, unless the principal be insolvent, rendering further pursuit fruitless. (p. 559).

Error to Circuit Court, Jefferson County.

Assumpsit by the Middle States Loan, Building & Construction Company against John H. Engle and another. The court sustained a demurrer to the third count of the declaration, and plaintiff brings error.

Affirmed.

JOSEPH TRAPNELL and BENJAMIN TRAPNELL, for plaintiff
in error.

FORREST W. BROWN and JACOB F. ENGLE, for defendants
in error.

MCWHORTER, JUDGE:

The Middle States Loan, Building & Construction Company brought its action of *assumpsit* in the circuit court of Jefferson County against John H. Engle and Thomas Jones, as guarantors of G. Frank Engle, and at April rules, 1897, filed its declaration containing the common counts, and three special counts. The defendants demurred to the declaration and to each count, in which the plaintiff joined. The court overruled the demurrer to the first and second counts and the common counts, and sustained it as to the third special count. Plaintiff, by leave of the court, withdrew the first and second special counts and the common counts, and the court, being of opinion that the action could not be maintained upon the contract set out in the remaining (third) count dismissed the action, but without prejudice to which ruling of the court plaintiff excepted, and obtained a writ of error. The said third count is as follows: "And whereas, also, the said G. Frank Engle, at the time of the promises and undertakings of the defendants, hereinafter mentioned, was indebted to the plaintiff in a certain other sum of money, to-wit, in the sum of \$800, and being so indebted, the said G. Frank Engle did execute and deliver to the plaintiff a certain obligation, in writing, signed and sealed by him, in words and figures following, to-wit: 'Know all men by these presents, that G. Frank Engle, of Brunswick, Frederick county, and state of Maryland, is indebted to the Middle States Loan, Building and Construction Company, of Hagerstown, Md., in the sum of \$800.00, being the amount of a loan this day received by him from said company, with interest thereon from this date, payable monthly. Now, the condition of the above obligation is such, that if the said G. Frank Engle shall pay the interest monthly on said sum of \$800.00, received by him, and shall make the monthly payment monthly on sixteen shares of stock of said company, subscribed for by him

in said company, eight of such shares being premium shares required to be taken for the loan instead of the usual premium, and any and all fines assessed against him or his said shares of stock, and shall likewise pay, when due, the taxes assessed against the property mortgaged, to secure the payment of said loan of eight hundred dollars, and the premiums necessary to keep the building on said mortgaged property insured from loss by fire, in such sum as the said company may require (not exceeding two thousand dollars), until the said stock subscribed by him, as aforesaid, becomes fully paid in and of the value of one hundred dollars per share, then it is understood that upon the surrender of said stock to said company this obligation shall be deemed fully paid and canceled. But if he fail to pay when due and payable the said taxes and insurance premiums, or make default in the payment of said monthly interest, fines, and monthly payments on said stock for a period of six months after the same or any installment thereof is due, then, at the option of the said company, the whole indebtedness evidenced by this obligation (including any taxes and insurance premiums due or paid by said company) shall at once become and be due and collectible, and a foreclosure of said mortgage in the manner therein provided may be had; but if the money due on this bond is paid or collected by the company by suit or foreclosure before the stock subscribed for shall have matured as aforesaid, then such rebate, if any, from payments on the premium shares will be allowed as the board of directors of this company shall, in their discretion, deem equitable. And thereupon, heretofore, to-wit, on the said 27th day of August, 1894, the said defendants and each of them did guaranty and faithfully promise the payment to the plaintiff of the said sum of money and interest, by a certain writing under seal, indorsed on the said obligation and signed by the defendants, in words following, to-wit: 'In consideration of the Middle States Loan. Building and Construction Company, of Hagerstown, Md., making a loan of eight hundred dollars to G. Frank Engle, and for the securing of the payment of which the said Engle did execute and deliver to the said company the within bond,

and a mortgage of even date herewith, we and each of us hereby guaranty the payment of said sum of eight hundred dollars by the said Engle to the said company, on the terms and in the manner set out in said bond and mortgage. Witness our hands and seals this 27th day of August, 1894.' That, default having been made by the said G. Frank Engle in his payments to the plaintiff, according to the tenor and effect of the said obligation the said debt and interest became due and payable, and the plaintiff instituted and prosecuted, in the circuit court of Frederick county, in the state of Maryland, a court of record having jurisdiction of the subject-matter and the parties, a proceeding in equity against the said G. Frank Engle, and for the foreclosure of the mortgage in the bond referred to, and that such proceedings were had that, after fully subjecting the property embraced in the said mortgage, it was ascertained by a decree of the said court that there remained due the plaintiff, on account of the obligation in writing aforesaid, a balance of nine hundred and thirty-five dollars and twenty-six cents as of the 8th day of August, 1896, and that the said decree remained wholly unsatisfied; that the defendants were duly notified of these facts, and thereby, according to the tenor of their said guaranty, they did on the day and year last aforesaid become liable to pay to the plaintiff the said sum of money, with interest, as aforesaid. And, being so indebted, the said defendants afterwards, on said day and year, in consideration of the premises, promise to pay said several sums of money and interest, respectively, to the plaintiff on request. Yet they have disregarded said promises, and have not paid the said moneys or any part of them, to the plaintiff's damage one thousand and five hundred dollars."

The question arising upon the record is whether the circuit court erred in sustaining the demurrer to the third special count. The court says, "Being of opinion that this action cannot be maintained upon the contract set out in the remaining (third) count of the declaration, doth sustain the demurrer thereto, and doth order the plaintiff's action to be dismissed, without prejudice." I deem it unnecessary to go into the origin and history of the action of

assumpsit. That is found in the text-books. However, it grew out of the necessity for a broader, more liberal and comprehensive form of action than the old actions of debt and covenant, and in order to make the action of *assumpsit* still broader in its scope the legislature has from time to time enlarged it. In *State v. Harmon*, 15 W. Va. 115, JUDGE HAYMOND gives us a comprehensive history of the legislation upon this subject, which legislation has finally evolved section 10, chapter 99, Code 1868, which provides that "an action of debt or *assumpsit* may be maintained on any note or writing, whether sealed or not, by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby or his agent." It is insisted by the appellees that the instrument upon which the guaranty is indorsed is not for the unconditional payment of money alone, and that it comes within the purview of the case of *State v. Harmon, supra*, which was an action based upon a bond for three hundred dollars, conditioned that if the principal could prove in any suit brought upon the bond within three months that he was the owner of certain property levied upon as the property of another, or, if he should fail to do so, would pay the value thereof, then the bond to be void, upon which bond the court held the action of *assumpsit* could not be maintained because it was not "such a bond, not being such a sealed instrument of writing, containing a promise, undertaking or obligation to pay money as that upon which said tenth section of chapter 99 of said Code authorizes an action of *assumpsit* to be brought." The case at bar is quite different. The bond is for the repayment of eight hundred dollars loaned money. The principal made his bond providing for its repayment in certain monthly payments, and further providing that, if he made default for a certain specified time in his monthly payments, then the whole sum of eight hundred dollars should at once become and be due and collectible, and a foreclosure of the mortgage executed on property to secure it should be had. And the defendants guaranteed the payment of the eight hundred dollars by the principal to the plaintiff on the terms and in the manner set out in the said bond

and mortgage. The declaration avers that default was made by the principal, that proceedings were had for foreclosure of the mortgage in a court of record of competent jurisdiction having jurisdiction of the subject-matter and the parties, and the property covered by said mortgage was fully subjected thereto, and by decree of said court it was ascertained that there remained due the plaintiff on account of the said obligation in writing a balance of nine hundred and thirty-five dollars and twenty-six cents as of the 8th day of August, 1896, and that the said decree remained wholly unsatisfied, of all which facts the defendants were duly notified. Here there is default of the principal, a legal subjection of the mortgaged property to payment of the obligation as far as it would go, and ascertainment by a competent court of the exact amount of the balance due from the principal debtor, and the guaranty by the defendants in writing for the payment of the debt. If the plaintiff had pursued the principal debtor still further, and had taken personal judgment against him and exhausted his other property, if any he had, and had averred such proceedings in its third count in the declaration, or had averred the insolvency of the principal to show that further pursuit would be fruitless, I think the declaration would have been good on demurrer. "A guarantor is one who becomes responsible for the debt, default, or miscarriage of another person. * * * The contract of a guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance." 1 Brandt, Sur. s. 1. "The contract of a guarantor is collateral and secondary; that of a surety is direct. The guarantor contracts to pay if, by the use of diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default." *Kearn v. Montgomery*, 4 W. Va. 29. So in *Barman v. Carhartt*, 10 Mich. 338, (Syl. point 1): "Where

one guaranties the collection of a note which is secured by a collateral mortgage referred to in it, and at the same time assigns the mortgage with the note, he is not liable upon his guaranty until resort has been had to the mortgage as well as to the note for the collection of the moneys secured." Also *Johnson v. Shepard*, 35 Mich. 115: "A guaranty of collection of a debt secured by mortgage creates no obligation on the part of the guarantor to pay until after foreclosure, decree, and a failure to obtain payment out of the mortgaged premises and out of the property of the principal." In *Farrow v. Respass*, 33 N. C. 170, on the guaranty, "I hereby guaranty the payment of the within note," it was held the guarantor was not primarily liable, and in order to charge him it was necessary that the creditor should be diligent in endeavoring to collect the note from the principal unless diligence would have been unavailing. Also, *Benton v. Gibson*, 1 Hill (S. C.) 56; *Rudy v. Wolf*, 16 Serg. & R. 79; *Johnston v. Chapman*, 3 Pen. & W. 18. In *Kern v. Ziegler*, 13 W. Va. 707 (Syl. point 1), "Under section 10, chapter 99, Code 1868, *assumpsit* will lie on a writing under seal containing dependent covenants, when the covenants sued on contains a provision, undertaking, or obligation to pay money, when the instrument is signed by the party to be charged or his agent." The appellees say that "*non est factum* is the general issue in debt upon writing obligatory, but no such plea is known in the action of *assumpsit*," and call attention to the fact that in this very case one of the defendants will and must rely upon that plea, because he claims that his signature to the writing sued upon is a forgery. If it be true that *assumpsit* cannot be maintained upon a writing obligatory because, perchance, the defendant might be under the necessity of pleading *non est factum* in order to make a complete defense, then section 10 is indeed rendered nugatory. I apprehend, however, that this is fully provided for by section 40, chapter 125, Code: "Where a declaration or other pleading alleges that any person made, endorsed, assigned or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it

in issue." And this really is all there is in the plea of *non est factum*,—simply a denial under oath of the making of the writing obligatory. The judgment of the circuit court sustaining the demurrer to plaintiff's third count of the declaration, and dismissing the action without prejudice, is affirmed.

Affirmed.

CHARLESTON.

MYERS *et al.* v. MILLER, *et al.*

Submitted Sept. 10, 1898.—Decided Dec. 10, 1898.

SUBROGATION—*Sheriff—Bond—Sureties.*

Sureties on the official bond of a sheriff, upon being compelled to make good the default of their principal, will, by the fact of payment, become equitable assignees, and be subrogated to the position of the State in respect of all its securities, liens, and priorities, for the purpose of enforcing reimbursements from their principal. (pp. 610-11-10.)

Appeal from Circuit Court, Berkeley County.

Bill by S. N. Myers and others against Charles H. Miller and others. From the decree, defendant D. W. Shaffer appeals.

Affirmed.

FAULKNER & WALKER, U. S. G. PITZER, J. N. WISNER and DANIEL B. LUCAS for appellant.

FLICK, WESTENHAVER & BAKER, for appellees.

McWHORTER, JUDGE:

S. N. Myers, P. C. Curtis, K. Creque, G. W. Buxton, W. S. Miller, James M. Vanmetre, John H. Miller, J. R. Brown, and Thomas H. Byres, sureties on the official bond of Charles H. Miller, sheriff of Berkeley County, filed their bill in the clerk's office of the circuit court of said county, at the December rules, 1895, against said Charles H. Miller; G. P. Miller, in his own right and as trustee; George N. Vanmetre; W. S. Small and John W. Porterfield, partners trading as Small & Co.; R. L. Thomas; M. A. Lamon; J. H. Miller, J. William Miller, and A. C. Miller, late partners trading as J. H. Miller & Sons; George W. Trimble; D. W. Shaffer; S. S. Felker; the National Bank of Martinsburg, a corporation; the People's National Bank of Martinsburg, a corporation; the Citizens' National Bank of Martinsburg, a corporation; E. L. Horner; C. M. Pine; J. Luther Ropp; William Rutledge; Thomas Kearns; John Simpson; L. C. Gerling; George W. Feidt; Alex. Clohan; Q. P. Riner; D. A. Beard; I. W. Wood; J. M. Small; E. W. Vanmetre; Berkeley County Canning Company, a corporation; James Oliver; J. H. Racey; D. F. Horner; T. A. Potts; Joseph E. Potts; Clara E. Blondell; J. A. Blondell; the Martinsburg, Mining, Manufacturing & Improvement Company, a corporation; George M. Bowers, H. C. Berry, James J. Thompson, James H. Smith, Levi Williamson, Moses Myers, James W. Robinson, D. S. Griffith, and M. T. Ingles, special commissioners in chancery cause of E. B. Faulkner and others, administrators, etc., against Melvina Grantham and others,—alleging: That on the 27th of April, 1895, the State of West Virginia recovered in the circuit court of Kanawha County against the defendant Charles H. Miller, late sheriff of Berkeley County, and the said plaintiffs, assureties on his official bond, a judgment for the sum of ten thousand, seventy-five dollars and three cents, with interest thereon at the rate of twelve per cent. per annum from that date until paid, and the sum of twenty-eight dollars and ninety cents costs, and exhibit-

ed a copy of the judgment. That writ of summons in the action in which said judgment was rendered against all of said defendants was issued on the 13th day of December, 1894, and was served on the defendant Charles H. Miller and the other defendants on the 19th day of December, 1894; and by virtue of the statute in such case made and provided, the said judgment became and is a lien on all the real and personal property owned by the said Charles H. Miller and the other defendants from the day on which the summons in said action was served on them. That on and prior to the 6th day of August, 1895, they, the said sureties of said Miller, were obliged to pay, and did pay, unto I. V. Johnson, the auditor of the State of West Virginia, and the person entitled by law to receive the said judgment, interest and costs, the full amount of such judgment, principal interest, and costs, and took from said auditor an assignment and transfer, and without recourse on the said State, of all its right, title, and interest in and to said judgment, and the right to enforce the lien thereof for the purpose of collecting the same out of any property of the said Charles H. Miller, the principal debtor; by means whereof they claim to be subrogated to the lien of the State as of the 19th day of December, 1894, on the real and personal property of said Charles H. Miller. That an execution was issued on said judgment on the — day of August, 1895, and delivered to the sheriff of Berkeley County, and an abstract thereof, together with the indorsement of the sheriff thereon, was duly docketed in the execution lien docket for the county of Berkeley, but that they are unable to realize anything under said execution out of the real or personal assets of said Charles H. Miller, owing to the fact that it was improper for him to make sale of real estate, because of the cloud upon his title to all of said real estate as hereinafter mentioned, and therefore the whole amount is still due and owing to the said plaintiffs. They then proceeded to set out the real estate of which said Charles H. Miller was seized, and the various judgments recovered by the other defendants to this bill, and prayed that all the creditors holding liens against the

real estate of said Charles H. Miller might be convened, and the amounts and priorities established; that the real estate owned by said Miller might be ascertained; that all the clouds upon the title thereto might be removed; and, in cases where the legal title to the same was outstanding, that the same might be gotten into the name of said Charles H. Miller, and a sale might be made for the purpose of paying all the liens thereon; and for general relief.

D. W. Shaffer answered the bill, alleging that he recovered a judgment against Charles H. Miller for two hundred and three dollars and forty-nine cents, with interest and costs, on December 22, 1894, no part of which had yet been paid, and denying all the allegations of the bill wherein the plaintiffs claim to have right to any prior lien upon the property, real and personal, of Charles H. Miller, because: "First. He denies that the judgment of the State of West Virginia against said complainants and Charles H. Miller was ever assigned to the complainants. Secondly. That even if an attempt had been made to assign said judgment, that it is absolutely null and void as to this respondent and other lien creditors of Charles H. Miller prior to the date of said judgment of the State. Thirdly. That said judgment of the State of West Virginia against complainants and Charles H. Miller was a judgment for taxes, and therefore could not be assigned to the complainants. Fourthly. The respondent further denies the payment of said judgment by said bondsmen, and demands strict proof thereof. Fifth. That the judgment obtained by the State of West Virginia against said complainants and Charles H. Miller did not carry with it any lien, and that it is purely a statutory remedy exercised by the State against said bondsmen, and, if any lien was created thereby, the statute gives no right to any person to assign the lien. Sixth. This respondent further denies the payment of said judgment to the State for taxes collected by Charles H. Miller by said bondsmen, but alleges, on the contrary, that it was paid in whole or in part by the collection of taxes, prior to and since the rendition of said judgment, by Charles H. Miller and constables of the county of Berkeley, and who turned said money over to said bondsmen.

This respondent asks for a strict account of all taxes collected by any person liable to the debt due the State, and what amount has been paid on Charles H. Miller's indebtedness to the State of West Virginia. And he further says that certain assignments have been made of deeds of trust, bonds, notes, and other obligations to W. S. Miller, L. C. Gerling, and others, of certain notes, without valid consideration, and which were liable to the State of West Virginia for taxes due and owing by the said Charles H. Miller, upon which the State of West Virginia had a lien at the time of said assignment by virtue of the statute in such case made and provided; which said amount, if applied to the payment of taxes due said State by said Miller, together with the taxes since collected and turned over for the payment of said indebtedness, would more than pay the same, —all of which matters and things respondent asked might be inquired into; and respondent, not admitting or denying any facts in complainant's bill, except so far as the responses in said answer contained, prayed to be hence dismissed, etc.

Defendant R. L. Thomas filed his answer, setting up his judgment recovered against C. H. Miller and Thomas Kearns for the sum of three hundred and ten dollars and five cents, recovered on the 13th day of June, 1894, and another judgment for the sum of two hundred and two dollars and seventy-five cents, recovered on the 25th day of July, 1895, and another judgment for the sum of two hundred and sixty-six dollars and thirty-five cents, recovered on the 12th day of October, 1894, with interest and costs on all three judgments, part of which said judgments only had been paid, and part of said costs; and denying all the allegations in plaintiffs' bill wherein the said complainants claim to have the right to any prior lien upon the property, real and personal, of Charles H. Miller, because of the same reasons set out in the answer of the defendant D. W. Shaffer.

On the 30th day of January, 1896, the cause came on to be heard on the bill of complaint and exhibits, process duly executed as to all the defendants, bill taken for confessed, and set for hearing at rules, upon the respective answers

of D. W. Shaffer and R. L. Thomas that day filed, and general replication thereto, and was argued by counsel, and the cause was referred to Commissioner in Chancery L. D. Gerhardt, with instructions: "First, to ascertain and report the real estate owned by the said Charles H. Miller, its fee-simple and annual rental value, and the condition of the title of the said C. H. Miller to the respective parcels of real estate; second, the liens, by judgment, deed of trust, or otherwise, against the real estate of said C. H. Miller, together with the respective amounts and priorities of such liens; third, any other matter by himself deemed pertinent, or which any of the parties in interest shall require him to ascertain and report;" and to give notice of the execution of said order of reference by advertisement of the same for four successive weeks in some newspaper published in Berkeley county, and to give the notice to lienholders required by section 7, chapter 139, Code.

On the 4th day of April, 1896, the commissioner filed his report, showing the real estate of the said Miller and the liens thereon; to which report the defendant, D. W. Shaffer and the Citizens' National Bank entered their exceptions, as follows: "First. Because the same did not remain ten days in the commissioner's office after completion, as required by law, and as will be seen by his certificate. Second. Because said commissioner did not notify said defendants that said report was to be closed on the 4th of April, or at any other time, but, on the contrary, had notice from the undersigned counsel for defendants that they would introduce further evidence to the commissioner in support of the claims of the defendants, as they had a right to do. Third. Because said report shows on its face that the commissioner has not audited the lien against Charles H. Miller's real estate according to their respective priorities. Fourth. Because from said report many of the liens audited by the commissioner as judgment liens in a particular class do not show the dates of judgment, or when the same became a lien upon the real estate, by the recordation of the same upon the judgment lien docket or otherwise, as required by law. Fifth. Because no judgments in the report show that they are liens

upon the real estate of Charles H. Miller. Sixth. Because the commissioner's report fails to show whether the so-called reported judgments are liens against the real estate of Charles H. Miller as the original debtor or only as indorser. Seventh. Because the judgment B, in the fifth class, does not show that it is a lien upon the real estate of Charles H. Miller. Eighth. Because the commissioner reports the lien in judgment B, fifth class, in favor of S. N. Myers, P. C. Curtis, K. Creque, G. W. Buxton, J. R. Brown, and Thomas H. Byers by right of subrogation, and does not show by what authority of law they can be or are subrogated, and these exceptants deny that they are subrogated to the so-called lien set up therein. Ninth. Because the commissioner in the so-called judgment B, in class five, undertakes to fix the lien for the benefit of S. N. Myers, P. C. Curtis, K. Creque, G. W. Buxton, J. R. Brown, and Thomas H. Byers, and that the same carries twelve per cent. interest, the right and the legality of which the exceptants deny. Tenth. Because the commissioner fails to report all the property of Charles H. Miller, as shown by evidence. Eleventh. Because the commissioner's report is irregular on its face, and filled with errors apparent on the face thereof. Twelfth. Because the proofs of certain interests jointly with Charles H. Miller are insufficient, and do not warrant the conclusions of the commissioner."

With his report the commissioner filed depositions of various parties, showing the rental and fee-simple value of the various properties in said Miller; and the deposition of D. C. Westenhaver, stating that the sureties of Charles H. Miller, who are plaintiffs in this suit, had settled this judgment with the State; that it was made through him as their agent; that the amount of cash accepted by the State in full settlement was nine thousand, two hundred and thirteen dollars and six cents, and of this sum eight thousand, six hundred and eighty-two dollars and eighty-two cents principal was paid on or about the 1st day of June, 1895, and the remainder, five hundred and thirty dollars and twenty-four cents, on or about the 1st day of August, 1895; and that, on this payment being completed, I. V.

Johnson, auditor of the State, executed the assignment, which is filed with the plaintiffs' bill, and also as a part of his testimony, and there should be credited on the total amount due the plaintiff the following sums: June 1, 1895, one hundred and seventy-two dollars and seventy-seven cents; August 2, 1895, five hundred and thirty dollars and twenty-four cents; August 26, 1895, one hundred and twenty-two dollars and sixty-five cents; November 27, 1895, six hundred and twenty-four dollars; and January 28, 1896, one hundred and thirteen dollars and sixty-seven cents; and filed a statement marked "B," showing these payments; and stated that this is all the money, so far realized from the administration of Charles H. Miller's assets, properly applicable on his indebtedness to the State; that the chief remaining items of personal property were two judgments against John B. Wilson and S. W. Walker, aggregating about one thousand, three hundred dollars and one thousand, four hundred dollars, a note for four hundred dollars made by George D. Walker, and a claim in a suit against J. M. Wisner for taxes and against George W. Feidt; that what would be realized from them remained to be seen; that, if the claims against Mr. Wisner and Mr. Feidt were collected, part of it would be applied to the judgment; that, besides these, there were a number of fragments of personal property, not very large in the aggregate, and scarcely worth the cost of collection. Mr. Westenhaber, in reply to the question: "It is generally understood in the community that, of this amount of money paid to the State of West Virginia, the same was raised by a note of Charles H. Miller's father, W. S. Miller, who became the maker of said note, which was indorsed by the other plaintiff's in the bill. Is that the way that this amount of money of nine thousand, two hundred and thirteen dollars and six cents was raised for the payment of this debt?" says: "Mr. W. S. Miller gave his note for eight thousand, six hundred and thirty-one dollars and seventy-five cents, indorsed by the plaintiffs, which was discounted, and the money paid to the auditor. The remainder, as stated in my foregoing testimony, and additional payments, making in all one thousand, five hundred

and sixty-three dollars and thirty-one cents, was paid from the administration of C. H. Miller's assets."

The assignment of the judgment by the auditor, as appears from the exhibit, is as follows: "Whereas, W. S. Miller, Jas. M. Vanmetre, K. Creque, S. N. Myers, P. C. Curtis, J. R. Brown, John H. Miller, Thomas E. Byers, and G. W. Buxton, sureties on the official bond of Charles H. Miller, late sheriff of Berkeley County, have paid to the State of West Virginia, the full amount, principal, interest, and costs, of a certain judgment recovered by the said State of West Virginia against the said Charles H. Miller, late sheriff of Berkeley county, and the parties above named as his sureties, in the circuit court of Kanawha County, West Virginia, on the 27th day of April, 1895: Now, therefore, I, Isaac V. Johnson, auditor of the State of West Virginia, at the request of the above-named sureties, so far as I have the power and authority as such auditor to do so, do hereby assign and transfer, on behalf of the said State, to the sureties aforesaid, the said judgment, without recourse on me or the said State, together with the right to them to use the name of the said State, so far as may be necessary, and without expense to the said State, in suing out further executions on said judgment, or prosecuting any suit or other proceeding for the collection of the said judgment from the said Charles H. Miller, the principal debtor therein. Given under my hand this 6th day of August, 1895. I. V. Johnson, Auditor.

On the 6th day of May, 1896, the cause came on to be further heard upon the papers and proceedings theretofore read and had therein, and on the report of L. D. Gerhardt, master commissioner, returned and filed on the 14th day of April, 1896. "And it appearing to the court that twelve exceptions have been taken to said report, all of which, except as to allowance by the commissioner of interest at 12 per cent. in judgment B, in the fifth class, are not well taken, it is adjudged, ordered, and decreed, that all of said exceptions, except as to said interest, be and are overruled, and said report, subject to a correct calculation of interest, be, and it hereby is, approved and confirmed. And it appearing to the court from said report that the said Charles H. Miller is the owner in fee simple of a tract

of land, containing 173 acres, situated in Berkeley County, W. Va., and of another tract of nine acres, situated in Berkeley County, W. Va.; that he is the owner of another tract of 40 acres, situated in Arden district, Berkeley, W. Va.; and that he is the owner of lot 4 block B, of Martinsburg Mining, Manufacturing and Improvement Co.'s addition to the town of Martinsburg and of lots 3 to 20, inclusive, of Charles H. Miller's Park lot sub-division, adjoining the said Martinsburg Manufacturing, Mining and Improvement Co.'s addition, and also of part of block C of plat No. 3 of the Martinsburg Mining, Manufacturing and Improvement Co.'s addition to the town of Martinsburg, containing $4\frac{1}{2}$ acres, and to which the title of said Charles H. Miller is perfect and is not in dispute. And it further appearing to the court that the liens against said real estate, together with their respective amounts and priorities, are as follows: * * * Fifth Clause. A judgment in favor of George W. Trimble for \$32.74, with interest on \$27.60, part thereof, from April 4, 1896; and also, of the same class, a judgment in favor of State of West Virginia against Charles H. Miller, late sheriff of Berkeley County, and S. N. Myers, P. C. Curtis, K. Creque, G. W. Buxton, W. S. Miller, James M. Vanmetre, John K. Miller, J. R. Brown, and Thomas E. Byers, as sureties, which judgment having been paid by said sureties, they are entitled to be subrogated to the lien of the State, and on which there is due said sureties the sum of \$8,126.67, with interest at the rate of 6 per cent. per annum on \$8,068.96, part thereof, from April 4, 1896, this being a correction hereby made in said report, and law giving the State lien from the service of the writ in said action, writ was served on December 19, 1894. Sixth Class. A judgment in favor of D. W. Shaffer for \$222.18, with interest on \$203.49, part thereof, from April 4, 1896; also a judgment in favor of S. S. Felker for \$124.79, with interest on \$113.04, part thereof, from April 4, 1896. Seventh Class. A judgment in favor of the National Bank of Martinsburg for \$111.07, with interest on \$99.39, part thereof, from April 4, 1896. Eighth Class. A judgment in favor of National Bank of Martinsburg against Thomas Kearns and Charles H. Miller, for the sum of \$139.12, with interest on \$126.16, part thereof,

from April 4, 1896. Ninth Class. A judgment in favor of the Citizens' National Bank of Martinsburg against the Berkeley Canning Company, E. W. Vanmetre, Alex. Clohan, D. A. Beard, Q. P. Riner, I. W. Wood, John M. Small, D. W. Shaffer, and Charles H. Miller, for \$333.46, with interest on \$302.77, part thereof, from April 4, 1896; also, a judgment in favor of the Citizens' National Bank against all of said parties, except D. W. Shaffer, for \$316.19, with interest on \$288.80, part thereof, from April 4, 1896; also a judgment in favor of J. Luther Ropp against Thomas Kearns and Charles H. Miller for \$72.60, with interest on \$64.49, part thereof, from April 4, 1896. * * * Whereupon it is further adjudged, ordered and decreed that the foregoing liens, according to their priorities and amounts as therein set forth, be, and the same are hereby, established as liens against the real estate of said Charles H. Miller, above described. And, it appearing to the court that the rents and profits from the real estate of the said Charles H. Miller will not pay off said liens within five years, it is thereupon adjudged, ordered, and decreed that unless the said Charles H. Miller, or some one for him, shall pay off said liens and costs of this suit within ten days from this date, then D. C. Westenhaver, S. W. Walker, H. U. Emmert, and U. S. G. Pitzer, who are hereby appointed as special commissioners for the purpose, shall proceed to make sale at the front door of the court house of Berkeley County by public auction, on the terms, for said tract of 173 acres, of one-third cash, the remainder in two payments, due in one and two years, respectively from day of sale, and as to all other real estate in two equal payments, one-half cash and the remainder in one year, the purchaser giving his notes for the deferred payments, bearing interest from the day of sale, and the title to the real estate sold to be retained until all the purchase money is paid. Said special commissioners shall give notice of the time, terms, and place of sale by advertisement for four successive weeks in some newspaper published in Berkeley County, and they, or some of them, shall, before proceeding to execute this decree of sale, give bond in the penalty of \$2,000 conditioned as required by law, with security to be approv-

ed by the clerk of this court. It further appearing to the court that as to all the other tracts of real estate owned by the said Charles H. Miller, or in which he owns an interest, as shown by the report of said master commissioner, L. D. Gerhardt, this court has jurisdiction thereof in separate suits, brought before the institution of this suit, and that on each or all of said tracts there is, or claimed to be, a just lien in favor of other parties, who are seeking to assert them in their respective suits, as shown by said report; and the court, therefore, being of opinion that such controversies must be settled and determined before it is proper to make a sale of said tracts of land in this cause: Thereupon it is further adjudged, ordered, and decreed that subject to such decrees as may be entered in said several respective causes, that the liens established in the foregoing part of this report be, and are hereby, established as liens also against said other tracts, as shown by said commissioner's report, or of said Charles H. Miller's interest therein, but said special commissioners shall not at this time, without further order, proceed to make sale thereof." From this decree the defendant D. W. Shaffer appealed to this Court.

First exception: Because the report did not remain ten days in the commissioner's office after completion, as required by law, and as will be seen by his certificate. The report shows that it was completed on the 4th day of April, 1896, and was filed April 14, 1896. Section 12, chapter 13. Code, "On Statutes and Rules of Construction," provides, "The time within which an act is to be done shall be computed by excluding the first day and excluding the last, or if the last be Sunday, it shall also be included." So it appears that it was held ten days by the commissioner before filing. Appellant, however, argues that, April 4th being Sunday, the completion of the report would have to date from Monday the 5th. This point would possibly be well taken if it were true, but on examination of calendars for the year 1896, which are considered good authority on that question, it appears that April 4th was Saturday.

Second exception: Because said commissioner did not

notify said defendants that said report was to be closed on the 4th day of April, or at any other time, but, on the contrary had notice from exceptants' counsel that they would introduce further evidence to the commissioner in support of their claims, as they had a right to do. It appears that due notice of the time and place of executing said decree of reference by said commissioner, and the notice to lienholders required, was given by the commissioner, and that his work was done with reasonable and commendable dispatch, yet without haste, and giving all parties ample time, in the absence of anything showing to the contrary, to furnish any evidence desired. "The commissioner has much latitude of discretion in granting continuances of proceedings before him, and the court whose order he is executing will not overrule his action in that respect, unless it is plainly erroneous. Still less will an appellate court reverse a decree for that cause; and in the absence of objections to such adjournments in the court below, and where it does not appear affirmatively that they were irregular, the cause will not be reversed on that account." 2 Bart. Ch. Prac. s. 193. Nothing was offered, by way of affidavit or otherwise, to support this exception, to show that exceptant did not have all reasonable opportunity to offer his evidence. Appellant had entered his exceptions. It does not appear that he asked further time, or desired to except further, or to offer anything in support of those already made, and no objection was made to the hearing. Consent to the hearing is thereby implied. In *Strange's Adm'r v. Strange*, 76 Va. 240, a case in which a commissioner's report had been filed, and the cause heard before the report had been filed the time required by the statute, the court say: "The objection made here in the present case cannot prevail, because it was waived in the court below. This is not expressed in the decree, but is plainly inferable from the language employed, that the said report be confirmed, except so far as excepted to. This indicates that there were objections to the report, but none to the hearing of the cause. It rather implies a consent to the hearing. In point of fact, however, as admitted in the argument, no exceptions were actually filed, none appear in the record,

and the inference from the decree is clear that, whatever objections to the report there may have been,—oral suggestions, probably, intended to be afterwards, but never actually, embodied in actual exceptions,—the hearing, at least, was by consent of parties.” In the case at bar appellant had entered twelve exceptions to the report of the commissioner, and they were passed upon by the court without objection, as well as no objection to the hearing, and, so far as the record shows, appellant desired to file no further exceptions. The object of the statute is to give parties interested an opportunity to except to the report. *Findley v. Smith*, 42 W. Va. 299. (26 S. E. 370, Syl. point 5).

Third exception: “Because said report shows on its face that the commissioner had not audited the liens against Charles H. Miller’s real estate according to their respective priorities.” The judgment in the fifth class for eight thousand, one hundred and twenty-six dollars and sixty-seven cents, as approved by the court, sought to be enforced by the plaintiffs in this case against the real estate of Charles H. Miller, was obtained by the State of West Virginia, in the circuit court of Kanawha County, against said Miller, as sheriff of Berkeley County, and the plaintiffs, his sureties on his official bond, and was rendered on the 27th day of April, 1895; in which action service of summons was had on the sheriff and his sureties on the 19th of December, 1894, under section 39, chapter 35, Code, which provides: “In any proceedings had under the provisions of this chapter against sheriffs or collectors and their sureties, or any, or either of them, for money due the State, any transfer, assignment or alienation of property, real or personal, or any judgment or decree obtained against or suffered by such sheriff or collector or their sureties or either of them after service upon them, respectively, of summons or notice, shall be deemed fraudulent or void as to any judgment that may be thereafter rendered in favor of the State in pursuance of such summons or notice. But this section shall not apply to a *bona fide* purchaser of any such property without notice.” It is claimed by plaintiffs that the lien of the State attached to the real estate of the said Charles H. Miller, and was a valid lien

thereon from the 19th day of December, 1894, the date of the service of the summons; and that the plaintiffs, as said Miller's sureties, having paid said judgment to the auditor of the State, are entitled to be subrogated to all the rights, remedies, and priorities of the State of West Virginia, and to enforce the collection of said judgment against the property of their principal in said bond. It is the placing of this judgment in class five, and giving it force as of December 19, 1894, the date of service of process, and postponing judgment of appellant, rendered December 22, 1894, to class six, which constitutes the ground of their exception. Here comes in the question as to what right, if any, the appellees, as sureties, of Charles H. Miller, are subrogated, by their payment to the State of the judgment due him. In *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. 60 (Md), it is said: "Payment by one who stands in the relation of surety, although it may extinguish the remedy or discharge the security as respects the creditor, has not that effect as between the principal debtor and the surety. As between them, it is in the nature of a purchase by the surety from the creditor. It operates an assignment in equity of the debt, and all legal proceedings upon it, and gives a right in equity to call for an assignment of all the securities, and, in favor of the surety, the debt, and all its obligations and incidents, are considered as still subsisting." In *Orem v. Wrightson*, 51 M. 34 (Syl. point 4); "The doctrine of subrogation or substitution is a peculiar feature of equity. It is not founded in contract, but has its origin in a sense of natural justice. So soon as the surety pays the debt of the principal debtor, equity subrogates him to the place of the creditor, and gives him every right, lien, and security to which the creditor could have resorted for the payment of his debt." In the opinion in the same case: "Is a different rule to be applied where the state is a creditor? We can see no reason why it should be. It is not necessary to inquire how, or in what manner, the State's right to rank as a preferred creditor is derived—whether it is a prerogative right derived from the common law, or whether it has been conferred by statute. As is said in some of the cases to which we have

referred, equity, in applying the doctrine of subrogation, looks not to form, but to the substance and essence, of the transaction. It looks to the debt which is to be paid, and not to the hand which may happen to hold it, and will see that the fund charged with its payment shall be so applied. In the present case, the debt of the collector, Leake, was due to the State at the time of his death. It was a charge against him as the principal debtor, and upon the assets left by him. The latter constituted the fund out of which it was to be paid as a preferred debt. And if equity does not regard the hand which holds the debt, and will see the fund charged with its payment shall be so applied, what difference can logically result whether the creditor to whom the surety has made payment is the State or an individual? While this view of law will do no wrong to anyone, it will add facilities in securing and collecting the revenues of the State. If sureties know that they can be subrogated to the priority of the State, less apprehension will be felt in joining in the bonds of collectors, and less delay in payment by solvent sureties. Other creditors are not injured, for, if the State has the first claim upon the fund, it does them no wrong, whether this claim is enforced by the State, or by those standing in its stead." In *Enders v. Brune*, 4 Rand. 445, the court, in treating the subject of subrogation, says: "In enforcing these principles, courts of equity look, not to the form, but to the essence of the transaction. They consider the doctrine of substitution, not as one founded in contract, but the offspring of natural justice; nor do they leave it to the creditor to cede his actions, but, so soon as a third person who has become bound with the debtor pays his debt to the creditor, they substitute him to the creditor, giving him every right, every lien, every security, to which the creditor could resort, and if the creditor should with bad faith release any of those securities it would be a bar *pro tanto* to his recovery against the surety." *McNeil v. Miller*, 29 W. Va. 480, (2 S. E. 335, Syl. point 1): "The doctrine of subrogation, being the creation of courts of equity, is so administered as to secure essential justice, without regard to form, and is independent of any contractual relation between the parties to

be affected by it." 3 Pom. Eq. Jur. s. 1419: "The surety who has paid or satisfied the principal's debt or obligation is entitled to be subrogated to, and to have the benefit of, all securities which may at any time have been put into the creditor's hands by the principal debtor, or which the creditor may have obtained by the principal debtor. By the fact of payment, the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration." And note 1 to same section and cases there cited. On the subject of sureties on official government bonds, 24 Am. & Eng. Enc. Law, p. 220: "Sureties on bonds for government officials, upon being compelled to make good the default of their principal, will be subrogated to the position of the government, in respect of all its securities, liens and priorities, for the purpose of enforcing reimbursement from their principal or contribution from their co-securities. And it is immaterial how the government's right of priority originated, whether out of common-law prerogative, positive statute, or contract; once established that it is entitled to rank as a preferred creditor, the same preference will be upheld, by way of subrogation, for the benefit of the surety." *Hawker v. Moore*, 40 W. Va. 49, (20 S. E. 848); *Boltz's Estate*, 133 Pa. St. 77, (19 Atl. 303); *Turner v. Teague*, 73 Ala. 554; *Livingston v. Anderson*, 80 Ga. 175, (5 S. E. 48); *Irby v. Livingston*, 81 Ga. 281, (6 S. E. 591); *Hunter v. U. S.*, 5 Pet. 173; *Robertson v. Trigg's Adm'r*, 32 Grat. 76; *Crawford v. Richeson*, 101 Ill. 351; *Hook v. Same*, 115 Ill. 431, (5 N. E. 98); 1 Jones, Liens, ss. 99, 100. It is contended that the auditor had no authority to assign the judgment of the State to plaintiffs. It is immaterial whether an assignment is made or not, as it will be seen from the authorities above cited that the doctrine is well established, by an almost unbroken line of decisions, that "a surety who has paid the debt of his principal obligor is subrogated in equity, by the act of payment, not only to the securities of the creditor, but to all his rights of priority"; and and "what difference can logically result whether the

creditor to whom the sureties made payment is the State or an individual?" 51 Md. 34, *supra*. The statement of the auditor, purporting to be an assignment, supplies the evidence of payment of the judgment to the State by the sureties. It is argued that because one of the plaintiffs made his note, and the others became indorsers, in order to raise the money to pay the State the amount of the judgment, as disclosed by the evidence, therefore the maker of the note is the only one who paid anything on the judgment, and the others cannot be entitled to the relief, because they have not suffered. The sureties had a right, among themselves, to devise ways and means to get the money, and, as between themselves, they may each and all be equally liable for the amount of the note so made and indorsed. They got the money and paid the debt, and are entitled to all the rights, remedies, and priorities of the State in respect to said judgment. And how is the complaining lienholder in any worse condition than he would be if the sureties had not paid the judgment, and the State were now pressing its collection instead of the plaintiffs?

The fourth exception: "Because from said report many of the liens audited by the commissioner as judgment liens in a particular class do not show the dates of judgment, or when the same became a lien upon the real estate by recordation of the same upon the judgment lien docket, or otherwise, as required by law." As to the dates of the recordation of the judgment, on inspection of the report, I find they are all given, up to and including the eighth class, and also in all after the ninth class. Those judgments in said ninth class are reported as being rendered "on the 24th —, 1895"; but as the judgment of appellant is in the sixth class, and having in said report priority over said ninth class, he is not affected by the omission. Yet, in the final statement or recapitulation of the liens in his report by the commissioner, he mentions the date of the several judgments in class nine as January 24, 1895. By reference to section 5, chapter 139, Code, it will be seen that "every judgment for money rendered in this State heretofore, or hereafter, against any person, shall be a lien on all real

estate of or to which such person shall be possessed or entitled at or after the date of such judgment, or, if it was rendered in court, at or after the commencement of the term at which it was rendered," except as provided in the following section, which provides for the docketing of judgments in the county court clerk's office as notice to purchasers only, and gives no additional dignity to the judgment lien as between the parties.

All the other exceptions relied upon, except the tenth and twelfth, have been disposed of in the treatment of the third and fourth.

Tenth: "Because the commissioner failed to report all the property of Charles H. Miller, as shown by the evidence;" and twelfth: "Because the proofs of certain interests jointly with Charles H. Miller are insufficient, and do not warrant the conclusion of the commissioner. The decree of reference required the commissioner: "First, to ascertain and report the real estate owned by the said Charles H. Miller, its fee-simple and annual rental value, and the condition of the title of the said Charles H. Miller to the respective parcels of real estate." The report of the commissioner responds to said decree of reference, and gives all the real estate, the only property on which he was required to report, and all of which, including that held jointly with others, was set out in the bill, and said Miller's interests described therein, and the bill taken for confessed, which supports said finding of the commissioner. I see no error in the decree, and the same is affirmed.

ON REHEARING.

On the day the decision was handed down in this cause a brief on behalf of the appellant, by Judge Lucas, came to the hands of the Court, which was asked to be taken as petition for rehearing. The brief starts out with the statement that "the nature of the doctrine of subrogation is fully discussed by this Court in two cases in 29 W. Va. and 2 S. E., by those pre-eminent jurists, JUDGE SNYDER and JUDGE T. C. GREEN," and says: "They both concur in defining the doctrine [quoting point 1, Syl., in case of *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335]: "The doc-

trine of subrogation, being the creature of courts of equity, is so administered as to secure substantial justice without regard to form, and is independent of any contractual relation between the parties to be affected by it." If he had included in his quotation the second point in the syllabus, he would have given us the whole scope of the doctrine which holds that "it is not applied in favor of one who has officiously, and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable; but it will be applied whenever the person claiming its benefit has paid a debt for which another was primarily answerable, and which he was compelled to pay in order to protect his own rights or save his own property?" He also cites *Hinchman v. Morris*, 29 W. Va. 673, (2 S. E. 863 Syl. point 1): "The levying and collecting of a tax, whether state or county, is a matter solely of statutory creation. Such taxes are not debts; and unless they are expressly, or by plain implication, authorized to be assigned legally or equitably, they are incapable of assignment, and no one can be subrogated to the rights and remedies of the State,"—and seems to rely very strongly upon this ruling to support his position that the sureties cannot be subrogated to the rights and remedies of the State. This, however, is not a general proposition that no one can be subrogated to the rights and remedies of the State in any case, but in the enforcement of the collection of its revenues in the shape of taxes, as was sought to be done in that case. *Hinchman v. Morris, supra*. There are abundant authorities in support of subrogation, to all the rights, remedies, and priorities of the State, of sureties who have paid the State's judgment. The case last cited is dealing with taxes uncollected, as against the individual charged therewith or his estate, when the sheriff had paid the same to the State, and was seeking to be substituted to the lien of the State for the taxes on the lands of the estate of Morris; and it is there held that taxes are not debts, and not capable of assignment, unless they are expressly, or by plain implication, authorized to be assigned legally or equitably. But the status of the case at bar is wholly different. The sheriff gave bond for the faithful discharge of his duties. He

failed to perform his duties. Surely, this bond is a contract. Suit is brought upon it, and a large judgment recovered against him and his sureties on this contract. Upon default being made by the sheriff, he became indebted to the State. Whether he had collected the taxes, or failed to collect them is immaterial. He had failed to return them as delinquent, and thereby the State, because of the default of its officer, had lost its remedy against the property of the taxpayer, and the only remedy it had was to proceed against the sheriff, its debtor, and his sureties, on the bond he had given. It was no longer taxes due the State which was under the statute a lien upon the property upon which it was levied, but a debt due to it from its defaulting officer. All the elements of taxes had been eliminated. I am unable to see the application of *Dent v. Wait's Adm'r*, 9 W. Va. 46, cited by appellants. In that case Crichton had made his negotiable note to Wait, who negotiated it. Protest followed. The bank secured judgment against maker and indorser, and execution was levied on property of Crichton, the principal debtor, who, with Dent as surety, gave forthcoming bond, which was forfeited, and Dent compelled to pay. In a suit to collect, by right of substitution, against the estate of Wait, the court properly held that Crichton was the principal debtor; that Dent relieved Wait at law by becoming the security of Crichton, and could not charge the estate of Wait, under the equitable doctrine of subrogation. *Perrin v. Ragland*, 5 Leigh 552; *Douglass v. Fagg*, 8 Leigh, 588. In *Dent v. Wait's Adm'r*, *supra*, the opinion says: "There is no doctrine better settled in this State than that, when a security pays a judgment for another, he is entitled to be subrogated to all the rights and remedies of the creditor against the principal debtor subsisting at the time he became so bound for the debt." *Robinson v. Sherman*, 2 Grat. 178; *Powell's Ex'rs*, v. *White*, 11 Leigh, 309; *Preston v. Preston*, 4 Grat. 88; *Hill v. Manser*, 11 Grat. 522.

It is contended that *Enders v. Brune*, 4 Rand, 438; cited in the original opinion, referred to the United States statute, and only carried the principle as far as the statute expressly provided, and which would not be extended. On

the contrary, the opinion quotes the statute, and shows the rights of sureties under it, and then asks: "Is the case of the plaintiff's within this last act? I incline to think not. The law speaks of principal and surety in the bond. Although these bonds were executed by Brune for the debt of Shelton & Co., and the plaintiff by discharging them paid their debt, yet Shelton & Co. were not principals, and the plaintiff's sureties, in the bonds." In the syllabus it is held: "Where A. gives his bond for duties on goods imported into the United States for B., the importer, and B. is not bound in the bond, if A. discharges the bond it seems that he cannot be placed in a position of the United States, as to priority, in a claim against A., under the law of congress. But upon general principles of equity, A., in such case, will be substituted in the place of the creditor (the United States), and have every preference that the United States were entitled to." The case of *U. S. v. Ryder*, 110 U. S. 730, (4 Sup. Ct. 196) cited by appellant, was a suit brought by Ryder as surety on a recognizance in a criminal proceeding, where the court held that "subrogating a surety on a recognizance in a criminal case to the peculiar remedies which the government enjoys is against public policy, and tends to subvert the object and purpose of the recognizance." It is insisted that, if appellees are subrogated at all to the rights of the State, their rights can only date from the date of the judgment in favor of the State. In *Orem v. Wrightston*, 51 Md. 34, cited in the opinion first filed herein, and other authorities there cited, as well as in *Enders v. Brune*, *supra*, it is held that the surety is entitled to all the securities, liens, and priorities of the creditor; and, as stated in *Enders v. Brune*, he is entitled "to have every preference that the United States were entitled to." But we are told that, "if appellees were thus entitled, by their laches, they have defeated their right of subrogation." The State is not liable for the laches of its officers, nor estopped by their conduct. *U. S. v. Kirkpatrick*, 9 Wheat. 720; *U. S. v. Vanzandt*, 11 Wheat. 184; *Dox v. Postmaster General*, 1 Pet. 318.

Section 25, chapter 30, Code, provides that "the taxes collected under this chapter shall be paid into the treasury as

follows: One-half of such taxes shall be paid on or before the 20th day of January in the year next after the said taxes shall have been assessed; one-fourth on or before the first day of May, and the remainder on or before the first day of August in such year." The sheriff's term expired December 31, 1892. He had until August 1, 1893, to pay in the last fourth of the taxes for 1892. The State commenced her suit December 13, 1894, and obtained judgment April 27, 1895. Appellees paid the judgment August 6, 1895, and instituted this suit November 26, 1895, but little over three months after their right accrued. It is not contended that, if the sureties had not paid the judgment, the appellants, or any of them, could have prevented the State from proceeding to exhaust the assets of the sheriff, Miller, in the satisfaction of its judgment, and surely they are in no worse condition because the sureties proceed against it. What new rights have accrued to appellants, or what rights of innocent parties have intervened, to be affected by any delay on the part of appellees in asserting their rights, which would not be equally affected if the State, and not the appellees, was pressing the collection of the judgment against the assets of the sheriff. Appellant's references to Sheld, Subr., and to 2 Brandt, Sur., are on the subject of laches and are based on decisions where, by the laches of the party seeking to be subrogated, the rights of others had intervened, as in *Gring's Appeal*, 89 Pa. St. 336, cited by appellant: "A joint judgment debtor was forced under execution to pay the whole debt. It was afterwards shown that he was only a surety. He neglected to have the judgment marked to his use for more than a year after its payment. Meanwhile the property of the principal debtor was sold, and the surety claimed that he was entitled to be subrogated to the rights of the creditors under the judgment as against subsequent judgment creditors. Held, that he had not exercised due diligence in having the judgment marked to his use, and his claim could not be allowed." This is about the strongest case cited, and in this case it was only after the sale of property that it was discovered that Gring was a surety, and the court say "that it cannot be permitted that a secret equity may be

held unasserted until holders of legal rights have been thrown off their guard, and lost their opportunity to protect themselves, by attending a sale against it, and then be brought forward, to the injury of those who had no notice of their existence." *Clevinger v. Miller*, 27 Grat. 740, is cited in support of appellant's contentions. That simply holds that "a sheriff or other officer who pays an execution in his hands for collection, without an assignment at the time of the judgment on which it is founded or the debt, is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having liens by judgment or otherwise." The case of the officer is very different from that of a surety of the debtor who is primarily liable, and who has been compelled to pay his principal's debt. The officer was under no obligation to pay the debt. He had a simple duty to perform,—to levy the execution and collect the money, if he could; if not, to return the execution. Having paid the debt without assignment, as against other creditors having liens, by judgment or otherwise he is regarded as a mere volunteer. So, also, appellant's citation of *People v. Onondaga Common Pleas*, 19 Wend. 79, was a case where a sheriff levied an execution on personal property, and left it with the execution defendant, who removed it from the county, and the sheriff was made liable for the amount. The court on notice, to the defendant, permitted a new execution to issue for the benefit of the sheriff, and he levied on the real estate of the defendant, saving, however, the rights of subsequent incumbrancers attaching after the removal of the personal property. And the reason given for it was that the levy by Luther (the sheriff) on the personal property was *prima facie* a satisfaction, and might well have induced the other creditors to suppose that the first judgment was satisfied, and led them on, in their own suits, to expense and trouble. "All this was very likely in consequence of Luther's neglect. He was careless in not keeping the property, and in leaving it with the defendant." In *Hoge v. Brookover*, 28 W. Va. 304, judgment was rendered for the State, May 9, 1889, the sureties having paid the judgment;

aud in August, 1892, more than three years after the judgment, filed their bill to be subrogated to the rights of the State which was done. The court in that case, after quoting the act of February 28, 1872, which is the same as section 39, chapter 35, Code, without the last clause, say: "This goes much further than could be claimed for the common law because it makes a judgment, thereafter secured, a lien on all the property of sheriff's collectors or their securities, or either of them, from the time when they respectively were served with such notice or summons, pursuant to which the judgment was afterwards recovered. The policy of the State, as manifested in this act, was effectually to prevent any fraud by which she should be deprived of her revenue or debts due her." In *Hawker v. Moore*, 40 W. Va. 49, (20 S. E. 848). JUDGE HOLT, in speaking of the doctrine of subrogation, says: "It is eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected. 'Equality is equity,' is on this branch its maxim. It springs naturally out of the two equities of contribution and exoneration, and is in fact one of the means by which those equities are enforced;" and citations, page 51, 40 W. Va., and page 849, 20 S. E. And continuing, he further says: "Here the plaintiff has paid off the judgment and asks the court to give him the benefit of the creditor's lien. Who can object to this? Who is injured by it? Not the bank, for they have received their debt from the plaintiff, and justice binds them to give the plaintiff their vantage ground. Not the principal debtor, for he is insolvent, and has no interest in the matter. * * * The other creditors cannot complain, for the debt has in truth not been paid, because not paid by the one ultimately bound, but by others, who became his unwilling creditors, in due course of law. But if there should be any one who, by any rule of strict law, or in equity and good conscience, stands on higher ground, or for any reason has a better right, he will not be displaced, or his right disturbed, for that is the essence of the doctrine." The statute gave the judgment of the State priority over all judgments recorded or laws

created after service of process in the action instituted by the State, and the rights of no *bona fide* purchaser without notice intervene, and I am unable to see how or in what manner the complaining creditors are injured. I see no sufficient reason for changing my conclusion in this cause.

Affirmed.

CHARLESTON.

WELTON *v.* BOGGS *et al.*

Submitted Sept. 9, 1898—Decided Dec. 10, 1898.

1. STATUTE OF LIMITATIONS—*Pleading—Suit in Equity—Judgment Creditor.*

Where a suit in equity is brought by a judgment creditor to subject the lands of the debtor to the satisfaction of his judgment, and the plaintiff in the bill sets forth the fact that there is another judgment against the same defendant older in point time, but which has not been kept alive by issuing executions as required by statute, but the defendant is in life, and does not plead the statute of limitations as to said older judgment, the plaintiff in said suit in equity has no right to file or rely on such plea. (p. 623).

2. STATUTE OF LIMITATIONS—*Pleading—Personal Privilege.*

The plea of the statute of limitations is, in general, a personal defense, to be made by the party against whom the demand is asserted. (p. 624).

3. STATUTE OF LIMITATIONS—*Rights of Stranger—Personal Privilege.*

A mere stranger to the claim, as a creditor, although he may be injuriously affected by his debtor's failure to set up the statute, cannot either set it up himself, or compel his debtor to do so, as in such case the privilege is personal, (p. 624).

Appeal from Circuit Court, Pendleton County.

Bill by S. A. Welton against E. W. Boggs and others.
Decree for defendant, and plaintiff appeals.

Affirmed.

F. M. REYNOLDS and L. J. FORMAN, for appellant.

GEORGE A. BLAKEMORE, for appellees.

ENGLISH, JUDGE:

At the May rules, 1894, for the circuit court of Pendleton County, S. A. Welton filed a bill against E. W. Boggs W. S. Boggs, trustee, I. P. Boggs, (since deceased), Solomon Cunningham, M. Manzy, and J. W. Warner, in which she alleged that on the 16th day of April, 1886, she obtained a judgment against defendant E. W. Boggs in said court for the sum of five hundred and twenty-two dollars and thirty-three cents, with interest thereon from that date, and costs; that on the 25th day of May, 1886, said judgment was duly docketed in the judgment lien docket of said county; that execution was issued on said judgment on April 23, 1886, and placed in the proper officer's hands returnable to July rules, 1886, which execution was duly returned; "No property found to levy on to satisfy this execution, or any part thereof. June 29th, 1886," that no part thereof had been paid; and that said judgment constituted the first lien on the real estate of said E. W. Boggs, which is described in the bill. It is also alleged in plaintiff's bill that from the records of said county it appears that on the 15th of May, 1879, judgment was rendered against said E. W. Boggs and Solomon Cunningham in favor of David Goff, commissioner, use of William Adamson, for the sum of five hundred and forty-nine dollars and thirty-seven cents; that execution was issued on said judgment on June 17, 1879, returnable to the 1st day of August, 1879; that the records do not show any return of said exe-

cution, but that no execution has issued thereon since, and that said judgment is barred by the statute of limitations, and constitutes no lien on the real estate of said E. W. Boggs mentioned in the bill; that there was no personal property of the defendant Boggs out of which her judgment could be made; and that the real estate of said Boggs would not rent in five years for a sufficient sum to pay off her judgment and costs. The plaintiff charges that her judgment aforesaid is the first lien on all of said real estate, and should first be paid out of the proceeds arising from the sale of said real estate; that the judgment aforesaid in favor of Goff, commissioner, use of Adamson, is out, by the statute of limitations, and constitutes no lien on any of said real estate; and that said Goff judgment should be credited by several payments, the amount of which was not known to plaintiff. And she prayed that her judgment lien might be enforced against said land.

On the 15th of June, 1894, the bill was taken for confessed as to the other defendants, except E. W. Boggs, who appeared and demurred to said bill. Demurrer was overruled, and cause referred to a commissioner to ascertain the real estate owned by the defendant Boggs, its character and location, its value, annual and absolute, and the liens binding the same, whether by judgment or otherwise, and their priorities. Said commissioner returned his report, giving the real estate owned by Boggs, and ascertaining that the plaintiff's judgment described in her bill was entitled to the first place in point of priority of lien against said real estate, and the deed of trust executed by Boggs and wife to W. H. Boggs, trustee, to secure to William Adamson said judgment for five hundred and forty-nine dollars and thirty-seven cents, costs, and interest, subject to a credit of three hundred dollars paid February 27, 1894, was entitled to the second lien on said land. This report was excepted to by J. P. Boggs, executor of the will of William Adamson, deceased, for the reason that it gave priority to the lien of S. A. Welton over the lien of William Adamson; the deed of trust lien having been taken to secure the payment of a judgment obtained long prior to the judgment of S. A. Welton, and said judgment of Adamson

being, at the time said trust deed was taken, alive, and on the lien docket of said county. On the 11th day of April, 1896, the cause was heard, and said exception to the commissioner's report was sustained, and the court decreed that said deed of trust was entitled, as a lien, to priority, and that the plaintiff Welton's judgment constituted the second lien on all the real estate aforesaid, and directed a special commissioner therein named to sell said real estate in the manner and upon the terms therein prescribed. From this decree the plaintiff, Welton, obtained this appeal.

The appellant made four assignments of error, all of which apply to the action of the court in sustaining said exception to the commissioner's report, which may be considered together.

Did the circuit court err in holding that the deed of trust, or the judgment it was executed to secure, was entitled to priority over the plaintiff's judgment? Now, while it is true that the plaintiff in her bill claims that she kept her judgment alive in the manner prescribed by the statute, and that the defendant Adamson allowed his judgment to expire, by neglecting to comply with the statutory requirements, yet the first question we encounter in considering this case upon the questions raised by the exception to said commissioner's report is whether the plea of the statute of limitations has been interposed in this case by any person entitled to the benefit of said plea. Can this plea be successfully relied upon by a co-creditor in a suit pending against a live debtor? Or is it a personal plea, which the judgment debtor alone could make available? Wood, in his valuable work on the Statute of Limitations (volume 1, p. 96), under the head of "Personal Privilege," thus states the law: "The plea of the statute of limitations is generally a personal privilege, and may be waived by a defendant, or asserted, at his election. * * * A *cestui que* trust may set up the statute whenever his trustee might do so, * * * and generally any person in privity with the claim sought to be enforced may set up the statute in bar thereto, as an executor, administrator, assignee, trustee, or any person who can be said to stand in the place and stead of the person for whose benefit the statute inures;

but a mere stranger to the claim, as a creditor of such person, although he may be injuriously affected by his debtor's failure to set up the statute, cannot do so himself, or compel his debtor to do so, as in such cases the privilege is personal, and one which the debtor may avail himself of, or not, at his election." In the case at bar the debtor has seen proper to exercise his election by declining to interpose the plea (which, in my opinion would have been effective, and given the judgment of the plaintiff the priority); and, having made such election, could the plaintiff file the plea herself? A question similar to this was presented to this Court in the case of *Lee v. Feemster*, 21 W. Va. 108, and it was there held that: "The plea of usury is a defense personal to the debtor. Therefore in his lifetime his creditor cannot plead it to defeat the claim of another creditor in whole or in part." JOHNSON, PRESIDENT, in delivering the opinion of the Court, said: "In *Wordyard, v. Polsley*, 14 W. Va. 211, we held that after a man was dead, and his estate was being distributed among his creditors in a court of equity, a creditor might rely on the statute of limitations to defeat the claim of another creditor. But this was put upon the principle that it was then impossible for the debtor to plead the statute of limitations; his voice was hushed; the law made it the duty of his personal representative to plead the statute of limitations, and if the personal representative did not do it, the creditors might do so, as against each other. With a living man it is altogether different. The law does not compel him to plead the statute of limitations. It is a personal privilege, that he can avail himself of, or not, as he pleases." It is true, that was a usury case, and these remarks were presented by way of illustration; but the analogy is strong and apparent, and, in my opinion, the plea of usury being a personal plea, the same rule applies with regard to the plea of the statute of limitations. Again, in the case of *Clayton v. Henley*, 32 Grat. 72, Staples, Judge, delivering the opinion of the court, says: "The court is further of opinion that the plea of the statute of limitations is, in general, a personal defense, to be made by the party against whom the demand is asserted, or to be waived by him, if he desire so to do." If a debtor, recognizing the indulgence of his creditor and the justice of his demand, is

unwilling to plead the statute, it is difficult to tell upon what ground a third person, who merely asserts the title to the property, can be permitted to do so." In the case under consideration, the defendant E. W. Boggs, for some reason known to himself, has not filed his personal plea, or in any manner raised the question as the validity of the judgment of William Adamson; and my conclusion from the authorities above quoted is that the exceptions filed by the executor of William Adamson to the commissioner's report were properly sustained by the circuit court. The judgment complained of is affirmed, with costs and damages.

ON REHEARING.

After a careful consideration of the briefs of counsel for the appellant, and the examination of the authorities cited, I find no cause to change the opinion above quoted; and the same is hereby adopted, and the decree complained of is affirmed.

NOTE BY BRANNON, PRESIDENT:

In *McClagherty v. Croft*, 43 W. Va. 270 (27 S. E. 246), we held that parties privy in estate with the debtor, as heirs, alienees, or mortgagees, owning or entitled to charge the very land, might plead the statute of limitations against other creditors, to defend their estates. I refer to former cases, leaving open the question involved in this case, whether one having a mere general lien, not being a specific lien on the land, could do so. And I put it as a *quaere* in the *Croft Case*. Our cases settle that creditors of a dead man, or of an insolvent partnership, may plead against other creditors the statute, there being a fund belonging to all. But unless we are ready to abolish the old rule, that limitation is a plea made only for the debtor, which he may waive, I do not see how we can hold otherwise than as JUDGE ENGLISH holds in this case. The statute pleads the bar in favor of a dead man's estate, and therefore creditors may do so, but no statute compels a living debtor to plead it. I make this note to call attention to the *Croft Case* and *Conrad v. Buck*, 21 W. Va. 396, in addition to *Lee v. Feemster*, cited by JUDGE ENGLISH.

Affirmed.

45	626
54	447

CHARLESTON.

ATKINSON v. PLUMB *et al.*

Submitted February 8, 1897.—Decided December. 14, 1898.

1. EQUITY—*Evidence—False Evidence.*

The evidence of parties who attempt to impose on a court of equity by false statements, manufactured accounts, or like deceptive practices, should be rejected on the hearing of the cause. (p. 633).

Appeal from Circuit Court, Wood County.

Bill by W. F. Atkinson against D. S. Plumb and others.
Decree for defendants, and plaintiff appeals.

Reversed.

JAMES A. HUTCHINSON and W. E. McDOUGLE, for appellant.

R. B. GRAHAM and CASTO & FLEMING, for appellees.

DENT, JUDGE :

The history of the case is as follows: Some time in the 70's, D. S. Plumb, a mechanic,—a house painter and paper hanger,—with little capital, but lots of pluck, as it afterwards turned out, began business as a green grocer in a little old frame building down on Ann street, in the city of Parkersburg; his wife, Mary Jane Plumb, at about the same time running a restaurant, both working together for mutual benefit,—not an uncommon occurrence for husband and wife; not a thing to arouse unwarranted suspicion or to create alarm. Being good Baptists, they made the

acquaintance of the plaintiff, W. F. Atkinson, who was also a good Baptist, and regular attendant at church. Brother Atkinson was a notary public, a real estate agent, and money lender, and at one time was engaged with witness Piersol in running a tow show boat along the Mississippi river and its tributaries,—Piersol running the boat, and Atkinson furnishing the means. This latter is cautiously revealed on cross-examination, and is a matter that should have its due weight in this controversy. Church acquaintance ripened into a very warm friendship between the two parties, and through the advice of Brother Atkinson, Brother Plumb purchased a small stock of goods and groceries of one Stagg, who wanted to retire from business, situated on the corner of Market and Third streets. Brother Atkinson moved his safe and desk into Brother Plumb's store, and the latter went into business on a much larger scale. To procure money or meet bills, notes were given to the bank, which, as Brother Plumb states, Brother Atkinson indorsed readily without the asking. The building in which the store was situated belonged to one Mum Jackson, but this probably had little effect on the transactions between the parties. Business was moving along prosperously, at least seemingly, when Brother Atkinson suggested to Brother and Sister Plumb that they should buy a home, and put it in the wife's name. A suitable property, with the aid of Brother Atkinson, was found and purchased for one thousand one hundred and thirty dollars on credit, and to pay the purchase money, after some intermediate transactions, finally a loan was negotiated with the Traders' Building Association and a deed of trust executed on the property to secure the same, originally one thousand two hundred dollars, now about equaling the market value of the property, at least exclusive of the improvements afterwards put upon it. This is the property now in controversy. At length Brother Plumb's notes and bills began to mature rapidly, and he some times imbibed too freely and became prostrated. Brother Atkinson continued to sign notes for discount, until, becoming a little weak in the knees, and sister Plumb being in poor health, he induced her to make a will, giving her property to Brother Plumb, that in case of her death he could be se-

cured as indorser of notes. Creditors becoming importunate and threatening suit, Brother Atkinson's faith gave way entirely and, becoming aroused and alarmed, he figured up Brother Plumb's liabilities, and found them much larger than had entered into his dreams. He at once insisted on Brother Plumb confessing judgment to him for one thousand five hundred and sixteen dollars and eighteen cents, as of July 8, 1891, and fourteen dollars and ten cents. There being already a judgment in favor of Shattuck & Jackson, this latter straw broke the camel's back, and the store was taken possession of and closed by a constable. A sale followed, and, although the services of the best auctioneer that could be found were procured, a stock of goods valued by Brother Plumb at two thousand one hundred dollars was sold out at about five hundred dollars. Hats that he had paid twelve dollars a dozen for were sold for twenty-five cents apiece, and fur caps costing fifteen dollars to eighteen dollars per dozen, at thirty-seven cents apiece. In Brother Plumb's own language: "They were literally thrown away. They piled them up in heaps, and asked a man what he would give for them." So, after the expenses of sale and prior execution were satisfied, nothing remained for Brother Atkinson, although his claim for rent, for which he was liable, and the judgment, amounting to about two thousand dollars. Brother Atkinson asked Brother Plumb to get his wife to give him a deed of trust on her property to secure him, as she had always promised that he should not lose anything. Brother Plumb suggested the matter to sister Plumb, and she was thunderstruck, and did not know what to make of it. After she recovered sufficiently, she said she would not give a deed of trust on her property if it was to her own father. Brother Atkinson thus brought roundly to a standstill, was also thunderstruck, and rushed off to consult James Hutchinson, Esq., a learned attorney at law, since deceased, who, having listened to the tale of woe poured into his listening ears, advise an appeal to the courts, where justice is unerringly administered. A bill was filed, and the Plumbs summoned, and brotherly kindness no longer existed between the parties. The defendants employed another prominent and equally learned, attorney at law, to

aid them in frustrating the unconscionable schemes of Atkinson, to deprive Mrs. Plumb of the little home she had so long been in securing. Thus ensued the battle of legal giants. Day after day it was waged with ceaseless vigor and tireless energy. Witness after witness was placed on the witness stand, and examined, cross-examined, re-examined, and re-cross-examined, etc., amid the objections, and cross-objections, criminations and re-criminations, and masterly debates of the learned counsel, duly interpolated in the depositions, and reported by the patient stenographer, until a large volume, consisting of four hundred and eighty pages, at a cost for transcript of one hundred and sixty-two dollars, and printing, three hundred and sixty-five dollars and thirty-two cents,—about the size of *Watterson's History of the Spanish War*,—is produced of the story, complete in one volume, of the Plumb family in relation to its dealings with W. F. Atkinson, for the consideration, information, and assistance of the court in determining which of the parties is the true aggressor against the other, that equal justice may be meted out without fear, favor, or affection. Mrs. Plumb, in her deposition, is made to detail her history, beginning way back in the '50's, when she was an unwedded maiden, in the sweet 'teens, teaching her first school, in the state of New York, earning forty dollars per month for four months in the year. At this time she first met Plumb, who was in the blush of early manhood, engaged in business as clerk in a grocery store. They were mutually attracted towards each other,—a thing not of rare occurrence. An attachment followed, which in 1857, was consummated by marriage. She then immediately began to keep an account against him, and loan him money, to be some time afterwards repaid to her in a home. She kept this up all throughout her married life, and throughout their various changes of location and fortune. The money so loaned was her early school money, and sums she had received from her father and sister, and earnings on her farm. Although her source of income was inconsiderable, according to Plumb's statement, her pocket book, like the widow's cruse of oil, was never empty. She always had money ready to loan him, and he was always a willing borrower.

Sometime after marriage they moved to Indianapolis, then to Chicago, and just before the great fire they moved to Wood County, and resided with her brother, John S. Meade. In 1874 she bought a farm for one thousand dollars, paid the first payment on it, and in about five years surrendered it for the unpaid purchase money. She continued to rent it until they moved to Parkersburg, when her husband says she saved over one thousand dollars clear out of corn, wheat, butter, eggs, chickens, and cattle, which she loaned to him at various times. She could have paid for the farm, but concluded to give it up, and moved to Parkersburg, where she had succeed in starting him in business. She exhibited a little book containing this account, with which she continually refreshed her memory, and which she says she began to keep 'way back in 1857. When, however, she was cross-examined about this book rather severely by Mr. Hutchinson, she became quite sick, and her statements became rather wild and wandering. Her counsel insisted that she was too ill to go on with the examination, and that he had a certificate of a physician to that effect that he had not intended to show, and of which opposing counsel was aware. After some further altercation between counsel, the taking of her evidence was adjourned until another day. The witness was finally compelled to admit that the first statements about the book and the account contained therein were untrue, caused by her failure of memory, loss of sight, and ill health. It clearly appears that this account in this book was fixed up by the defendants after the institution of this suit. A part of the early account is as follows, beginning a few days after marriage.

Olean, N. York, Oct. 8, 1857.

M. J. PLUMB,

In acct. with D. S. PLUMB.

D. S. PLUMB, DR.

1857.			
Oct,	8,	To cash.....	\$ 75 00
"	18	" "	22 00
Nov.	1.	" "	50 00
Dec.	12.	" "	5 00
"	20.	" "	10 00

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Dec. 27. 1858.	To cash	10 00
Jan 12. 1859.	" "	19 00
Aug. 18. 1859.	" "	95 00
Jan. 2. 1863.	" "	150 00
Aug. 6. 1864.	" "	125 00
Feb. 4. 1865.	" "	44 00
June 10. 1865.	" "	35 00
July 13. 1866.	" "	100 00
Apr. 1867.	" "	2 00
" 5. 1867.	" "	5 00
Oct. 29. 1867.	" "	100 00
Mar. 9. 1868.	" "	28 40
June 3. 1868.	" "	75 00
Jan. 6. 1868.	" "	35 00
Apr. 8. 1868.	" "	25 00

\$1,010 40

D. S. PLUMB, CR.

Dec. 14. 1857.	By cash.....	\$ 9 00
Sept. 9. 1863.	" "	55 00
Aug. 1864.	" "	100 00
Sept. 5. 1865.	" "	22 50
Sept. 6. 1867.	" "	35 00
Aug 16. 1866.	" "	37 00
Dec. 10. 1868.	" "	85 00
June 13. 1868.	" "	20 00

\$ 363 50

- Etc.

The sources from which she received most of her money are detailed as follows :

Received for teaching school	\$ 120 00
1856.	120 00
1856.	
Jan. From Brother Dorm.....	75 00

1859.			
Sept	From father.....	100	00
Oct.	" "	20	00
1860.			
Apr.	" "	20	00
1861.			
June.	" "	25	00
1862.			
Sept.	" "	50	00
1863.			
July.	" "	5	00
1864.			
Oct.	" "	10	00
1865.			
Jan.	" "	20	00
1868.			
Dec. 19.	Sister Maude	350	00
			<hr/>
			\$ 915 00

The account is exhibited as carefully and accurately kept beginning back in 1857, and ending with the bringing of this suit, and being balanced, shows Plumb, after all his payments on the property, repairs, etc., in debt to Mrs. Plumb, one thousand six hundred and one dollars and seventy-nine cents,—a little in excess of plaintiff's judgment. This whole account, except that she may have received the money, was undoubtedly manufactured for the purpose of this suit by collusion between the defendants, and entirely discredits their testimony. There are many other things detailed by these defendants as to their money dealings with one another, especially the accuracy with which every dollar of account between them was carefully kept and accounted for, so different from the ordinary relations existing between husband and wife, when the wife imposes such implicit trust and confidence in her husband, as represented by them, that render their statements improbable, and deprive them of any weight in the determination of this cause. Casting their evidence aside, the other facts and circumstances show that whatever interest they, or either of them, have in the property in controversy, or in the improvements put thereon, came from the husband's business. Atkinson was fully aware of what was going on all the time, and connived at it, but, as a brother in the church, he had no idea that those who were in such close communion with him would deceive or

attempt to defraud one of the chosen band of Gideon. They might despoil the gentiles, but not the elect; and they undoubtedly humored him to this belief, for Sister Plumb was very careful to assure him that he should not suffer, when he was about to start to New Orleans to see about his show boat. But, while it was the hand of Esau, it was the voice of Jacob, and the mess of pottage did the rest. His confidence was abused under the guise of friendship, which blinded his eyes, and he was despoiled by those of his own household; and with the earnest plea for retribution he seeks justice against his despoilers. What we have we freely give unto him.

This case is governed in all respects by the principles settled by this Court in *Miller v. Cox*, 38 W. Va. 748, (18 S. E. 960); *Brooks v. Applegate*, 37 W. Va. 373, (16 S. E. 585), and other cases to which reference is made herein. All appellant can subject to his debt, however, is the equity of redemption in the property in controversy. The building association has a prior lien, which, at the commencement of this case, amounted to one thousand forty dollars and seventy-six cents, and the defendants had at that time ceased to pay anything thereon, so at the present time the debt must amount to about the full value of the property. The appellant's costs, except expenses of sale, must yield in priority to the association lien, and therefore he may have had his troubles for his pains, and this litigation prove abortive, except the satisfaction of personal triumph over a faithless religious brother, who, under the cloak of piety, won his love, only to shake his confidence in all professions of friendship. The suit appears to be a contest over a bag of wind, and this Court might affirm the decree without, probably, inflicting pecuniary loss or gain to any one; yet as a court of equity it should not hesitate to rebuke those who attempt to impose upon it by false statements, manufactured accounts, or other deceptive practices, for the purpose of deterring future attempts of like nature. For these reasons, the decree complained of is reversed, and the cause remanded for further proceedings, according to the rules and principles governing courts of equity.

Reversed,

45	634
46	115
45	634
163	206

CHARLESTON.

BARRICKMAN v. MARION OIL CO.

Submitted Sept. 13, 1898.—Decided Dec. 14, 1898.

1. NEGLIGENCE—*Natural Gas—Degree of Care.*

A person or corporation engaged in furnishing natural gas to stoves, heaters, pipes, etc., for purposes of domestic light, heat, and fuel in a dwelling house, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of the business, that injury to others may not be caused thereby; that is to say, if the delicacy, difficulty, and danger are extraordinarily great, extraordinary skill and diligence is required. (p. 647).

2. NEGLIGENCE—*Natural Gas—Pressure of Gas—Damages.*

If the defendant, so furnishing such gas, negligently and carelessly suffer and permit a greater amount of pressure of said gas to be furnished than is reasonably proper for said purpose, by reason whereof the house or building being so furnished is consumed or injured by fire, resulting from such negligence, the defendant is liable in damages for such loss. (p. 647).

3. NEGLIGENCE *Natural Gas—Defective Appliances—Proximate Cause—Damages.*

If such defendant suffer and permit its regulators or other appliances to be and remain for an unreasonable time in such condition that they do not control the amount and pressure of gas so furnished, so that more than a safe and proper amount of gas is so furnished, the defendant is guilty of negligence, and liable in damages for injuries proximately caused by such negligence. (p. 647).

4. NEGLIGENCE—*Natural Gas—Proximate Cause.*

If such injury is the natural consequence of such negligence, and such as might have been foreseen and reasonably anticipated as the result of such negligence, then such negligence must be regarded as the proximate or direct cause of the injury, in the absence of intervening negligence. (p. 648).

5. NATURAL GAS—*Pressure of Gas—Fire—Inference.*

The mere fact that a building so furnished with gas was set on fire from the gas is not sufficient to justify the inference that an increased pressure of gas caused the fire. (p. 6+8).

6. EVIDENCE—*Natural Gas—Pressure of Gas.*

In the trial of an action against a corporation so furnishing natural gas to a dwelling house, for damages for causing the destruction of such house by fire by negligently permitting too great a pressure of gas, it is not competent to prove by a witness the bare fact of what pressure the gauge of another gas company usually indicated. (p. 643).

Error to Circuit Court, Monongalia County.

Action by Franklin Barrickman against the Marion Oil Company. Verdict for plaintiff, and defendant brings error.

Reversed.

A. B. FLEMING and U. N. ARNETT, for plaintiff in error.
COX & BAKER, for defendant in error.

MCWHORTER, JUDGE:

Franklin Barrackman brought his action of trespass on the case in the circuit court of Monongalia County against the Marion Oil Company, claiming damages for the destruction of a dwelling house, owned by him, by fire, occasioned by the negligence of the defendant in furnishing natural gas at said house for domestic purposes. On the 18th of February, 1896, defendant appeared, and demurred to the declaration, and to each count, in which plaintiff joined, and of which the court took time to consider. On the 24th of the same month the court overruled the demurr, and the defendant pleaded to the general issue. Plaintiff filed an amended declaration, when defendant again demurred to plaintiff's whole declaration, and to each count, which demurrers were overruled by the court, and defendant entered its plea of not guilty to both the declaration and the amended declaration. A jury was duly impaneled, the case tried, and on the 20th of February, 1897, the jury rendered a verdict for plaintiff, and assessed his damages at one thousand dollars. Defendant moved the court to set aside the verdict, and grant it a new trial; because the verdict was contrary to the law and the evidence; for permit-

ting improper evidence to go to the jury; for rejecting proper and material evidence offered by defendant; because the court gave several improper instructions on behalf of the plaintiff, and rejected and refused to give proper instructions offered by defendant, and in not giving instructions asked for by defendant in the form as prepared by defendant, and in modifying and making changes therein and additions thereto, and in giving them in such changed and modified form; which motion to set aside the verdict and grant a new trial was overruled and denied, and defendant excepted, and the court entered a judgment on said verdict against the defendant. Defendant took nine several bills of exceptions, which were severally signed, sealed and made a part of the record. The defendant applied for and obtained a writ of error, assigning as error the overruling of the demurrers to the declaration, and the amended declaration, and to each count; the permitting of improper evidence on behalf of plaintiff to go to the jury, as set out in bills of exceptions 5, 6, 7, 8 and 9; in giving plaintiff's instructions, and each of them, and in refusing defendant's instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, and each of them; and in refusing to give defendant's instruction No. 8 in the form prepared and requested by defendant, and in amending the same by making addition thereto by the court, and in giving same to the jury in the form as shown by bill of exceptions No. 4.

It is claimed that the demurrer to the declaration and to each count should have been sustained. There are three counts, two in the original and one in the amended declaration; and it is claimed by appellant that these counts are inconsistent (especially the one in the amended declaration) with those contained in the original declaration. In the latter (the original) it is averred that the dwelling house destroyed was the property of the plaintiff, and makes no mention of the fact that it was occupied, or in possession of a tenant or agent. In the amended declaration it is averred to be the property of and owned by plaintiff, while it is in the possession of one Milton Rinehart, as the lessee thereof, and from the plaintiff. It is no less the property of plaintiff, being in the possession of plaintiff by his tenant, than if the possession was held by him in person, and

the third count, or amended declaration, is simply to show the manner of the possession of the owner of the property, and is an eminently proper count. It is insisted that because it is averred, in substance, in all the counts, that it was the duty of defendant to control and regulate the quantity and pressure of gas in such manner that only such quantity and pressure as was necessary for fuel and domestic heat for said dwelling house should be furnished, the demurrers should have been sustained that the degree of diligence set forth in each count is greater than is required by law. Appellant says that: "If it can be claimed that because natural gas is a very dangerous substance, etc., and that, under certain circumstances, more than ordinary care can be required of a person or a company furnishing it, such a rule would not apply in this case, as it is shown the appellant only had what is known as a 'high pressure line' for its own use, and that the appellee and a few other householders in a small village were allowed to connect therewith for their own accommodation by means of their own gas line, called a 'service line,' and which was as much a 'gas line' as was the appellant's main." This may all be well said in the course of the trial on the merits of the case, but not on demurrer. It nowhere appears in the declaration that defendant had only what is known as a "high pressure line" for its own use, and a few householders connected with it for their own accommodation. The theory of the declaration is that defendant was in possession of certain wells producing natural gas, and was engaged in the business of furnishing gas through its pipe lines to consumers for fuel and domestic heating purposes for consideration, and it is averred that it was so furnishing such gas to the said dwelling house, the property of said plaintiff, under contract for valuable consideration, and, being so engaged, it was the duty of defendant to properly control and regulate the quantity and pressure of the said natural gas so far as same was necessary for fuel and domestic heat, which should be so furnished by it to and for said dwelling house; and then it is averred that on the day, etc., and at the county of Monongalia, the defendant wrongfully, negligently and unlawfully caused, suffered and permitted

the said natural gas to run, flow and pass out of and from the said wells producing natural gas, and out of and from the said lines of pipe, machinery and apparatus of which the defendant was possessed, in and into and through the said burners, heaters, stoves, grates, pipes, lines of pipe of plaintiff (which were averred to be in good repair, and fit for the purposes for which they were used) in so great and large quantities, and with so great a pressure, that the said burners, heaters, etc., of plaintiff were then and there forced open, broken, thrown apart, and burst, and by reason thereof the said great and large quantities of gas did escape and pass out of said pipes, burners, etc., in and into the said dwelling house, and was ignited, burned and exploded by the fires then and there lawfully kept, and being in the burners, heaters, etc., by which means the said house was burned and destroyed. "The object of the declaration is to set forth the facts which constitute the cause of action so that they may be understood by the party who is to answer them by the jury, who are to ascertain the truth of the allegations, and the court who is to pronounce judgment." Hogg, Pl. and Prac. § 140; *Berns v. Coal Co.*, 27 W. Va., 285; *Snyder v. Electrical Co.*, 43 W. Va. 661 (28 S. E. 733). The declaration in the case at bar is sufficient, and the court did not err in overruling the demurrers.

The second assignment is that the court erred in permitting the evidence mentioned in appellant's bills of exception numbered 5, 6, 7, 8 and 9, and in each of them, to go to the jury. That contained in bill No. 5 relates to certain questions asked witness Mrs. Berry, who lived some three hundred or four hundred yards from the house that was destroyed, and that was furnished with gas from the same pipe line. Witness was asked what the gas pressure was that day, at her home, about the time of the fire, and shortly before. She stated that it was very high; that she burned it in the cooking stove in the kitchen. "How high was it, and what did you do at your house, Mrs. Berry?" Answer: "When I went out the stove was red hot, and the wall was burning behind the stove." She was asked to describe to the jury how the gas was acting in the kitchen stove, and what it was doing. Answer: "Why, the gas— The stove

was red hot, and it was burnt behind the stove when I went out." She also said: "I first throwed water on the fire, I guess." Also certain testimony of E. O. Weidman, who was supplied with gas at his blacksmith shop, from the same line, and two hundred or two hundred and fifty yards from the Barrickman house that was burned, where he was asked: "How was the pressure at your house that day at the time, or shortly before, the fire?" Answer: "The gas, I think was stronger than usual." Also the same bill sets forth certain questions asked of witness Mrs. Rosa Sutton, who lived about one hundred yards from the Barrickman house, and was furnished gas from the same main, who was asked to state what the condition of the gas pressure was about the time, or shortly before, the house was burned. Answer: "It was very high. Was over the stove at work, and it was so high that it shook the stove lids, and I got out of the way of it. I turned it off, and then went to the other fires, and could not get it regulated, and I turned it off from the house. When I heard of the fire, I turned it off from the house." Plaintiff's counsel also propounded the four following questions to the same witness, and received the following answers, as set out in said bill No. 5: "Q. Where did you go from the dwelling? A. To the store. Q. How was it there? A. Just the same as in the house. Q. What was the condition of the gaslights in the store? A. Well, so high they blowed out. Q. When you went to the stove in the kitchen, how was the gas acting? A. I said that I was trying to regulate it in the stove, and went to the sitting room, and could not regulate it there, and came back to the stove, and turned it off from the grate." Also witness Charles Hall, minister of the Methodist Protestant Church, who lived about one hundred yards from the house that burned,—two houses between them. Witness' house was supplied with natural gas from the same main which furnished the Barrickman house, and he was asked: "What was the condition of the gas, and where were you?" Answer: "I was sick that morning, lying on a cot in the room where one of my fires was. I kept two fires, one in the stove and sitting room. My brother was with me. He was reading by the fire. Noticed the fire come on. I thought he didn't notice it, as

he was reading, and I spoke to him, and directed the fire to be turned lower. The pressure seemed to be higher than usual." Also, in the same bill, witness Jacob Barrickman, who lived one hundred and twenty-five or one hundred and fifty yards from the house that burned, and was supplied with gas from the same main line, and got home about half past 11 o'clock, day of fire, was asked: "Now, Mr. Barrickman, when you came home, what was the pressure in your house? A. Well, I guess when I came home, it seemed to be higher than usual. Q. I will get you to state to the jury what the pressure and condition of the gas was about the time the fire broke out in the Barrickman house, and shortly before. A. Well, I guess about eleven, or between eleven and twelve o'clock, it came on very strong, high pressure, stronger than it usually came on in the store building there." This testimony so excepted to refers to the condition of the gas as to the force and pressure at the time of the fire; no regulator on the main pipe intervening between the house burned and houses occupied or referred to by the witnesses. Appellant cites the case of *Emerson v. Gaslight Co.*, 3 Allen, 410, to sustain its position. That case is not applicable. It was for damages sustained by sickness introduced and suffered in a certain building by inhaling the gas that escaped into the house, but evidence that the inmates of another house were made sick in consequence of inhaling the gas that escaped into their house from the same defect in defendant's pipes was held inadmissible. "The evidence should be limited to the effect of the gas upon those who hold in common, and, under similar circumstances, inhaled it." *Hunt v. Gaslight Co.*, 8 Allen, 169. The condition and pressure of the gas in the neighboring houses at the time of the fire, there being no intervening regulator or hindrance to the force of the gas between the burned house and the other houses mentioned, would clearly indicate what it was at the house of plaintiff, and I see no valid objection to the answering of the questions.

Bill of exceptions No. 6 relates to the testimony of plaintiff, which refers to what took place between plaintiff and Charles J. Meeks, an employee of defendant, who had been asked by plaintiff to go to the house, and see if the

fixtures were safe; complaint having been made about a leak of gas. Witness was asked and answered questions as follows: "Q. What was done in reference to the leak? A. He called my attention to the leak, and says, 'It is not safe,'—the way Charlie spoke to me; and, says I, 'Charlie, if it is not safe, I want you to take the gas out of the house until you know it is safe.' I told him to shut the gas out of our house until he knowed it was safe. Q. State whether or not it was repaired after that. A. It was repaired after that. Q. State whether or not Meeks approved of it after it was repaired. A. He did." Appellant insists that it owed no duty to appellee in reference to service line and gas fittings in the house and about the store, and that anything that Meeks did towards repairing them was done for and as the employe of appellee, or for his accommodation, and neither his acts nor declarations would bind appellant. Meeks testified that he was not the agent of defendant; that he was an employe, a laborer. It is true, he did so much of skilled work for defendant as to connect the service pipes with the main line, which was his only duty connected therewith; but, as alleged in the declaration, plaintiff was the owner of and put in the pipes, burners, etc., in his house, by himself, or his tenant, and it was his duty to keep the same in good order and repair. Meeks was only the agent of defendant in the line of his duties in its employ, and could not be called to the service of another without the consent of defendant, and it was improper to admit as testimony before the jury what Meeks told plaintiff in relation to the condition and repairs of the fixtures of plaintiff in his house and on his premises.

Bill of exceptions No. 7 relates to the evidence of E. O. Weedman, who was asked what the gauge at the regulator showed the pressure to be at the time of the fire, the house still burning, but nearly burned down, answered, "The hand was on the other side of the pin," and witness was asked "whether that gauge registered more than 180 pounds, or whether that was all it could register." He answered, "There was only 180 pounds marked on it." Witness had stated that once in a while for probably six months back he had gone to the register, and generally looked at what it stood at, and the best that he could

remember, outside of the one time that he had mentioned, he had seen it as low as fifteen pounds and as high as forty or fifty; and was asked and answered the following questions: "Q. From that time on up to the fire, when you examined the gauge, about what would the pressure stand at? A. Well, I have saw it as low, I guess. Q. Usually about what, ordinarily? You have seen it as low as that, and as high as that. About what was it usually? A. I suppose midway between, I reckon." To which exceptions were taken. Also the following questions and answers propounded to and given by witness Reuben Laytan (included in same bill of exceptions): "Q. Whether or not you examined it on that day, and what it registered? A. I went over and looked at it, after the fire was all over. Q. How shortly afterwards? A. It might have been two hours. Q. Mr. Laytan, was part of the house still burning? A. Yes, sir; there was fire there yet when I went there. Q. Mr. Laytan, how did that gauge register? A. Eighty pounds. when I went there." This examination of witnesses was on the matter of the flow of the gas, and referred to the register of defendant at its regulator; and, while it was a little after the fire,—an hour or two,—it was corroboration of witnesses who had testified to the fact of an extraordinary flow of gas at and immediatly before the time of the fire; and I think the testimony was competent, as well as that tending to show what the flow had been for some time before.

Bill of exceptions No. 8 relates to testimony of witnesses J. M. Gregg and Samuel McGara. Gregg, an employe of the Union Improvement Company, engaged in furnishing natural gas for fuel, light, and heating in the vicinity of Morgantown, had been employed in the office about four years, and was asked, "I will get you to state to the jury what that pressure is customarily," and, by the court, "What pressure is usually contained in gas lines that furnish gas for domestic use?" Answer: "I can only speak from the gauge in one office. All the examinations there I made of that gauge show from a half to a pound; sometimes a little lower than a half a pound, in cold weather." Witness McGara was asked and answered the following questions, to which exceptions were taken, as

shown in said bill No. 8: "Q. I will get you to state to the jury what pressure is used by you, or is necessary to operate an oil well,—what pressure without fire and without steam. A. Well, 30 pounds pressure is enough to pump a well. Q. Mr. McGara, from your experience in the gas business, I will get you to state whether or not, in your judgment, 30, or 40, or 50, or 60, or 80, or 180 pounds of gas on the service line to dwelling house—say $\frac{3}{4}$ to $\frac{3}{8}$ inch pipes—is dangerous. A. I would not let that go into a house." These two witnesses were examined as experts. Gregg had been employed as bookkeeper in a gas office, and, as stated by himself, could only speak from the gauge in his office. Said he was not an expert; did not claim to know what pressure would be dangerous. It is not competent to prove, in this case, the bare fact of what the gauge of some other gas company might show, unless accompanied by scientific explanations or expert testimony showing its relevancy; hence the evidence of Gregg should not have been admitted. Witness Samuel McGara had large experience, and could be considered an expert in the use of gas, as well as the handling and controlling of it, and his testimony, excepted to, taken in connection with the rest of his testimony, is not exceptionable, and it was properly admitted.

The ninth bill of exceptions relates to the introduction by plaintiff of a receipted gas bill made by defendant against E. O. Weedman, dated January 1, 1896, for "the use of gas as per contract to February 1st, 1896, \$3." This, I presume, was introduced to prove the fact that defendant was furnishing gas for consideration. This bill was made quite nine months after the injury complained of, and I fail to see the relevancy of it, even if it were a transaction between defendant and plaintiff, instead of a stranger. Its admission was an error; yet, I think, harmless.

At the request of appellee, the court gave to the jury the following instructions, numbered 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, and 14: "(1) The jury is instructed that a corporation or person furnishing natural gas to the stoves, heaters, burners, pipes, lines of pipe, machinery, or apparatus of another, to be used for the purpose of domestic heat and fuel in a dwelling house, is bound to exercise such

care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business, in order that injury may not be occasioned to others; that is to say, if the danger, delicacy, and difficulty is extraordinarily great, extraordinary skill and diligence is required. (2) The jury is instructed that it was the duty of the defendant, as it is of all incorporated companies which are invested for their own profit and advantage with the great and important privilege of supplying a community with natural gas for private habitation, to be used as fuel and domestic heating, to exercise such care, diligence, and skill in the conduct of its business as is proportioned to the danger or risk to the property of others. (3) The jury is instructed that if they believe from the evidence that at the time of the alleged injury and burning of the plaintiff's dwelling, mentioned in the declaration, the defendant, for a valuable consideration, was furnishing natural gas to the stoves, grates, burners, heaters, pipes, lines of pipe, machinery, or apparatus used for the purpose of fuel and domestic heat in and about said dwelling, and that the defendant negligently and carelessly suffered and permitted a greater amount of pressure of said gas to be furnished than is proper for said purpose, and that by reason thereof the plaintiff's said dwelling house was consumed by fire, then the jury must find for the plaintiff, and assess his damages occasioned by such burning. (4) The jury is instructed that if they believe from the evidence that natural gas is a very dangerous, volatile, and explosive substance, then the person or corporation who furnishes it for valuable consideration to the stoves, heaters, burners, pipes, lines of pipe, machinery, or apparatus of another, for the purpose of fuel for domestic heat, must use such care, skill, attention, and diligence in order that no greater amount of pressure thereof shall be so furnished than is proper to be furnished, and in order to prevent injury to the person or property of others, as is proportioned to the danger of such substances." "(6) If the jury believe from the evidence that natural gas is an extremely dangerous substance, and that the defendant, at the time of the burning alleged in the declaration, was furnishing, for a valuable considera-

tion, such gas to the heaters, burners, stoves, grates, pipes, lines of pipe, machinery, or apparatus of the plaintiff, for the purpose of using such gas as fuel for domestic heat in and about the dwelling house mentioned in the declaration at the time of such burning, then it was the duty of the defendant under the law to use such care, diligence, and skill, both in providing proper machinery, regulators, and apparatus, work, labor, and attention, in order to control such gas, and the amount of pressure furnished to such dwelling house, as is in due proportion to the nature of the substance used. (7) If the jury believe from the evidence that the defendant, at the time of the alleged burning of the dwelling house of the plaintiff, mentioned in the declaration, was, for a valuable consideration, furnishing natural gas to said dwelling house or to the machinery and apparatus used in and about said dwelling house, for the purpose of burning natural gas for domestic heat and fuel, as mentioned in the declaration, and that the said defendant at the time of such burning negligently failed to provide all such appliances, regulators, and machinery as were reasonably necessary to control the amount and pressure of the gas so furnished, then such failure is negligence on the part of the defendant, and it is liable for such damage to the property of another as was the direct result of such negligence. (8) The jury is instructed that if it believes from the evidence that at the time of the burning of the dwelling house of the plaintiff, alleged in the declaration, the defendant, for a valuable consideration, was furnishing to and for the machinery and apparatus in and about said dwelling house, for the purpose of domestic heat and fuel, a substance known as 'natural gas,' and that at the time of such burning the defendant permitted and suffered its regulator or regulators to be in such condition that it or they did not control the amount and pressure of the gas so furnished, and that it had permitted and suffered its regulators to remain in such condition for at least three or four months prior to the time of said burning, and that more than a safe and proper amount of gas was so furnished, then the defendant is guilty of negligence, and it is liable to the plaintiff for any damages occasioned to him directly caused by such negligence." "(10) The jury is

care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business, in order that injury may not be occasioned to others; that is to say, if the danger, delicacy, and difficulty is extraordinarily great, extraordinary skill and diligence is required. (2) The jury is instructed that it was the duty of the defendant, as it is of all incorporated companies which are invested for their own profit and advantage with the great and important privilege of supplying a community with natural gas for private habitation, to be used as fuel and domestic heating, to exercise such care, diligence, and skill in the conduct of its business as is proportioned to the danger or risk to the property of others. (3) The jury is instructed that if they believe from the evidence that at the time of the alleged injury and burning of the plaintiff's dwelling, mentioned in the declaration, the defendant, for a valuable consideration, was furnishing natural gas to the stoves, grates, burners, heaters, pipes, lines of pipe, machinery, or apparatus used for the purpose of fuel and domestic heat in and about said dwelling, and that the defendant negligently and carelessly suffered and permitted a greater amount of pressure of said gas to be furnished than is proper for said purpose, and that by reason thereof the plaintiff's said dwelling house was consumed by fire, then the jury must find for the plaintiff, and assess his damages occasioned by such burning. (4) The jury is instructed that if they believe from the evidence that natural gas is a very dangerous, volatile, and explosive substance, then the person or corporation who furnishes it for valuable consideration to the stoves, heaters, burners, pipes, lines of pipe, machinery, or apparatus of another, for the purpose of fuel for domestic heat, must use such care, skill, attention, and diligence in order that no greater amount of pressure thereof shall be so furnished than is proper to be furnished, and in order to prevent injury to the person or property of others, as is proportioned to the danger of such substances." "(6) If the jury believe from the evidence that natural gas is an extremely dangerous substance, and that the defendant, at the time of the burning alleged in the declaration, was furnishing, for a valuable considera-

tion, such gas to the heaters, burners, stoves, grates, pipes, lines of pipe, machinery, or apparatus of the plaintiff, for the purpose of using such gas as fuel for domestic heat in and about the dwelling house mentioned in the declaration at the time of such burning, then it was the duty of the defendant under the law to use such care, diligence, and skill, both in providing proper machinery, regulators, and apparatus, work, labor, and attention, in order to control such gas, and the amount of pressure furnished to such dwelling house, as is in due proportion to the nature of the substance used. (7) If the jury believe from the evidence that the defendant, at the time of the alleged burning of the dwelling house of the plaintiff, mentioned in the declaration, was, for a valuable consideration, furnishing natural gas to said dwelling house or to the machinery and apparatus used in and about said dwelling house, for the purpose of burning natural gas for domestic heat and fuel, as mentioned in the declaration, and that the said defendant at the time of such burning negligently failed to provide all such appliances, regulators, and machinery as were reasonably necessary to control the amount and pressure of the gas so furnished, then such failure is negligence on the part of the defendant, and it is liable for such damage to the property of another as was the direct result of such negligence. (8) The jury is instructed that if it believes from the evidence that at the time of the burning of the dwelling house of the plaintiff, alleged in the declaration, the defendant, for a valuable consideration, was furnishing to and for the machinery and apparatus in and about said dwelling house, for the purpose of domestic heat and fuel, a substance known as 'natural gas,' and that at the time of such burning the defendant permitted and suffered its regulator or regulators to be in such condition that it or they did not control the amount and pressure of the gas so furnished, and that it had permitted and suffered its regulators to remain in such condition for at least three or four months prior to the time of said burning, and that more than a safe and proper amount of gas was so furnished, then the defendant is guilty of negligence, and it is liable to the plaintiff for any damages occasioned to him directly caused by such negligence." "(10) The jury is

instructed that if they believe from the evidence that the defendant was guilty of the negligence or carelessness charged in the declaration, and that the injury complained of was the natural consequence of such negligence or carelessness, and such as might have been foreseen and reasonably anticipated as the result of such negligence or carelessness, then such carelessness or negligence should be regarded by the jury, as the proximate or direct cause of the injury. (11) The jury is instructed that the burden of proving contributory negligence rests with the defendant, but the jury may look to all the evidence offered by both parties to determine the question of contributory negligence. (12) The jury is instructed that remote negligence on the part of the plaintiff or those occupying the house in the declaration mentioned at the time of the alleged burning will not prevent the plaintiff from recovering for an injury for the destruction of his property immediately caused by the negligence of the defendant. (13) The jury is instructed that the negligence on the part of the plaintiff, in order to defeat of itself his recovery, must be a proximate cause of the injury. (14) The jury is instructed that the negligence of the plaintiff, Barrickman, or his tenant, Rinehart, in this case, which preclude a recovery, is where, in the presence of a seen danger, he omits to do what prudence requires to be done under the circumstances for the protection of his property, or does some act inconsistent with its preservation. Where the danger is not seen, but merely anticipated, or dependent upon future events, such as the future continuance of the defendant's negligence, plaintiff is not bound to guard against it by refraining from his usual course, being otherwise a prudent one, in the management of his property and business." To which appellant excepted by bill of exceptions No. 2. The argument against the giving of most of these instructions is the same as that used on the demurrer. Appellant insists that under the averments of the declaration, as well as the instructions, too high a degree of care and diligence is required of appellant in the handling of the gas; that there is a proper rule for each case as it arises; and it is insisted that in this case it is that of ordinary care and diligence.

In *Berns v. Coal Co.*, 27 W. Va. 285 (Syl. point 7) it is held that: "'Negligence' and 'ordinary care' are correlative terms. What constitutes ordinary care depends on the circumstances of each particular case. It is such care as a person of ordinary prudence would exercise under the circumstances." What are the circumstances of this particular case? Appellant was engaged in the business of transporting and furnishing to consumers an article of trade and traffic of the most delicate, explosive, and inflammable nature, and very dangerous, and the care and diligence of appellant must be commensurate with the danger incident to the handling of the commodity. Appellant cites *Bartlett v. Gaslight Co.*, 122 Mass. 209, to show that appellee's instructions 12, 13, and 14 especially were bad, where it was said: "The jury, in the main part of the charge, had been told that the burden of proof was on the plaintiff to show affirmatively 'that the injury was occasioned by the negligence of the servants of the defendant company, and that in no material degree did the negligence of the tenant of the plaintiff contribute to that injury. * * * The question is, was either of these parties negligent or not? If either, which? * * * The plaintiff must satisfy you upon the whole evidence, by a fair preponderance of evidence, that he was in the exercise of such care as a prudent man might reasonably be expected to exercise under the circumstances, and that the explosion was caused by the negligence of the defendant.' The company is liable in damages 'if the plaintiff's tenant was in the exercise of due care.'" Instruction 12 was not proper to be given, because it was not applicable. In the very nature of the case at bar, as disclosed by the record, plaintiff's negligence, if guilty of any, was not remote, but proximate; and the instruction was misleading. No. 13 is the law in that case, as laid down by this Court in *Snyder v. Railroad Co.*, 11 W. Va. 14 (Syl. point 7), discussed by the Court on page 37. The nature of that case differs very materially in many respects from the case at bar, and I can scarcely see how it can be made to apply here, unless there should be added to it, "unless the danger was such as no prudent man ought to risk." With these qualifying words it might have been given. Appellee's instructions Nos. 3, 7, and 8

should not have been given, because "they present a certain hypothesis [the negligence of defendant], and make the case turn wholly on it, disregarding another hypothesis [contributory negligence] fairly arising on the evidence." *Industrial Co. v. Schultz*, 43 W. Va. 470 (27 S. E. 255, Syl. point 9); *McKelvey v. Railway Co.*, 35 W. Va. 500 (14 S. E. 261, Syl. point 3). Instruction No. 10 is subject to very much the same criticism, and should not have been given without adding to it, "in the absence of intervening negligence," or something to the same effect. The other instructions of appellee were properly given.

Appellant asked the instructions Nos. 1 to 13, inclusive, which (leaving out No. 8) are referred to in bill of exceptions No. 3, and are as follows: "(1) The plaintiff, in order to recover in this suit, must satisfy the jury by a preponderance of testimony that the defendant was guilty of negligence, and that such negligence caused the injury. (2) The mere fact that the house of the plaintiff was set on fire is not sufficient to justify the inference that an increased pressure of gas caused the fire. (3) If the jury believe from the evidence that the plaintiff and his tenant, Milton Rinehart, or either of them, had knowledge some time prior to the burning of the plaintiff's house that the pressure of gas in the defendant's lines was uneven and variable,—greater at some times than at others,—and if, by reason of such uneven and variable pressure, it was dangerous to use the gas from said line for lighting and heating the dwelling house owned by the plaintiff and occupied by Milton Rinehart, then the plaintiff was guilty of negligence in permitting the same to be used therein; and if the jury believe that the fire which destroyed said house was caused by an uneven and variable pressure of gas, he cannot recover damages against the defendant for the injuries sustained. (4) If the jury believe from the evidence that the plaintiff and his tenant, Milton Rinehart, or either of them, had knowledge, prior to the burning of said house, that the pressure of gas in defendant's lines was variable and uneven, and that the tenant left the gas burning in said house during his absence and the absence of his family therefrom, on the day and at the time of the so leaving of the gas burning during his and his family's

absence from the house, this was negligence on the part of the tenant, which negligence of the tenant is to be imputed to the plaintiff, and the plaintiff cannot recover in this action. (5) If the jury believe from the evidence that at the time of the fire which destroyed plaintiff's house there was an unusual pressure of gas, as described in the declaration, and that said gas, with unusual force, came into the pipe and appliances and to the burners, valves, and fittings on the plaintiff's premises, and thus increased the quantity of gas where the same was to be consumed, yet the plaintiff cannot recover if the jury further believe from the evidence that the pipe, valves, fittings, and appliances placed on the plaintiff's premises for the purpose of conducting said gas from the defendant's line to said house were not in good order and repair, and were at the time of the fire unsafe for the use and consumption of said gas, and that by reason thereof the said gas escaped, or the quantity thereof being burned was increased, and caused the destruction of said house. (6) If the jury believe from the evidence that the plaintiff's tenant, Milton Rinehart, was guilty of negligence in the placing or maintaining on said leased premises the pipe, valves, fittings, and appliances which made the connection to conduct said gas from defendant's main into the house on said leased premises in an unsafe condition, and in not keeping and maintaining said pipe, valves, fittings, and appliances in good order and repair, and in proper and safe condition for the use and consumption of the gas, and that by reason of which unsafe condition of said pipe, valves, fittings, and appliances said house was set on fire, and destroyed, by means of an explosion of said gas, or by means of an increased heat or the escape of gas, occasioned, in whole or in part, by such unsafe and defective pipe, valves, fittings, and appliances, the negligence of the tenant, Milton Rinehart, should prevent the plaintiff from recovering in this action, and the jury should find for the defendant. (7) If the jury believes from the evidence that, at the time of the fire which destroyed the plaintiff's house, Milton Rinehart, the plaintiff's tenant, was guilty of negligence in not keeping and maintaining pipes, valves, fixtures, and appliances placed on the premises of the said plaintiff for the purpose

of conducting the said gas from the defendant's main into the said dwelling house on said premises in good order and repair, and if the said negligence of the said tenant, in whole or in part, caused or occasioned the injury complained of and described in the declaration in this cause, the plaintiff cannot recover, and the jury should find for the defendant." "(9) If the jury believe from the evidence that the house of the plaintiff, described in the declaration, was by the defendant furnished and supplied with gas on the application of Milton Rinehart, the plaintiff's tenant, and that such gas was conducted from the defendant's main or gas line to said house by means of pipe, valves, fittings, and appliances laid and furnished by said tenant, with the consent of the plaintiff, and that pursuant to a promise made by said tenant that he, said tenant, would keep and maintain said pipe, valves, fittings and appliances necessary and proper for the safe use and consumption of said gas in good order and repair, and that the fire which consumed the plaintiff's house was caused by an explosion of the gas in said house, or by any other means resulting from the escape or leakage of said gas, or the negligent manner of taking care of or using the same after leaving the defendant's main, the plaintiff cannot recover, and the jury should find for the defendant. (10) If the jury believes from the evidence that the injury complained of by the plaintiff in his declaration resulted from a cause which neither the plaintiff nor defendant knew of, and of which the defendant could not, by the exercise of ordinary care and prudence, have foreseen or known, the injury would be the result of accident, and for which the defendant would not be responsible, and the jury should find for the defendant. (11) Only ordinary care and prudence was required of the defendant in the conduct of its business and in the management of the gas line described in the declaration, and, if the jury believes from the evidence that the defendant exercised ordinary care and prudence in the delivering of its gas through the pipe line into the service line of the plaintiff or his tenant leading to the house which was destroyed, then the plaintiff cannot recover for the injury complained of. (12) If the jury believes from the evidence that the defendant had upon its

gas line from which it delivered gas to the plaintiff for use in his house, gas regulators in good order and sufficient to control the pressure and quantity of gas, and that the plaintiff used ordinary care in having its gas line and said regulators inspected and kept in good working order and safe condition, and that said regulators were so inspected within an hour or less of the time of the accident complained of in the declaration, and found to be in good order, and working properly, and the gas properly regulated and controlled thereby, and that from some unknown cause said regulators, or one of them, after said inspection, and before said fire, became temporarily and suddenly obstructed in some unknown way, which caused them, or either of them, to cease work, or regulate said gas, and by reason of which the quantity and pressure of gas was enormously and suddenly increased to a high pressure, which occasioned the injury complained of in the declaration, the defendant is not responsible for such accident, and the plaintiff cannot recover in this action. (13) The jury is instructed that in this case negligence is the ground of the plaintiff's action, and that it therefore rests upon the plaintiff to trace the fault of his injury to the defendant, by proving negligence upon the part of the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if from these circumstances so proven by the plaintiff, and from all the evidence, including the evidence of the defendant, it appears that the fault of the injury was mutual, or, in other words, that the negligence is fairly imputable to the plaintiff or his tenant, the plaintiff cannot recover."

Appellant's instructions Nos. 1 and 2 were given. As to Nos. 3 and 4, in my view of the case, they are too sweeping. It is a fact known to all who have any knowledge of natural gas that the pressure is uneven and variable, greater at some times than at others, which facts are also abundantly shown in the evidence in this case; and by reason of such variable pressure it is more or less dangerous to use it; and, if instruction No. 3 is proper to be given, contributory negligence would have to be presumed in every case of this character. I think it simply tends to confuse and mislead the jury; and, if No. 4 is proper, then in

no instance could a consumer leave his house with the gas turned on to any extent without being guilty of contributory negligence in case of destruction of his property from the gas. However, a majority of the Court holds No. 3 to be good, and that the same should have been given, and that No. 4 was properly rejected. As to instructions Nos. 5, 6, 7, and 9, there was evidence tending to prove that the fixtures of plaintiff, especially those connecting the gas with the stove where the fire originated, were not well put in, as shown by the evidence of Robert and Charles Barrickman, who did the work; that it was probably not a good job, or well done, and that Dr. Rinehart, the tenant, had notice thereof; and also tending to show that such fixtures were not in good order and repair, and were not safe. In view of the evidence in the case, said last-named instructions were improperly rejected. Appellant's instructions 10, 11, and 12 are drawn upon appellant's theory of "ordinary care" only being incumbent upon it, and were properly rejected as presented, and should not have been given unless "ordinary care" was so qualified in said instructions to be "such care as is required by the dangerous character of natural gas." Instruction No. 13 is the law as laid down by Cooley on Torts (page 803, side page 673). He says: "The plaintiff must show the circumstances under which the injury occurred, and if, from these circumstances, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by showing them, disproved his right to recover;" and adds: "There is a legal presumption against negligence, upon which he is at liberty to rely, thus casting the burden of showing contributory negligence upon the defendant." The instruction is in consonance with plaintiff's instruction No. 11 "that the burden of proving contributory negligence rests with the defendant, but the jury may look to all the evidence offered by both parties to determine the question of contributory negligence"; and should have been given. *Gerity's Adm'x v. Haley*, 29 W. Va. 98, (11 S. E. 901,) and *Carrico v. Railway Co.*, 39 W. Va. 86, (19 S. E. 571, Syl. point 7).

Instruction No. 8, which is made the subject of bill of exceptions No. 4, is as follows; "(8) If the jury believe

from the evidence that the house of the plaintiff described in the declaration was by the defendant furnished and supplied with gas upon the application of the plaintiff's tenant, Milton Rinehart, and that such gas was conducted from the defendant's main or gas line to the said house by means of pipe, valves, fittings, and appliances laid and furnished by the said tenant with the consent of the plaintiff, and that such gas was furnished upon the promise of the said tenant that he would keep and maintain said pipe, valves, fittings, and appliances in good order and repair, the jury is instructed that it was the duty of the plaintiff, or his tenant, Milton Rinehart, to see that the pipe, valves, fittings, and appliances and fixtures on the premises of the plaintiff described in the declaration, and which conducted the gas from the defendant's gas line to the premises of the plaintiff, were kept in good order and repair, and in proper and safe condition for the use and consumption of gas on the premises and in the house of the plaintiff; and if the jury believes from the evidence that such pipes, valves, fittings, and appliances which made the connections necessary to conduct said gas from the defendant's gas line to said premises were not, at the time of the burning of the plaintiff's house, in good order and repair and safe condition for the consumption of such gas, and that the fire which destroyed the plaintiff's house was caused from gas, and that such fire was caused by escape or leakage of such gas, or the negligent manner of taking care of or using the same after leaving the defendant's main or gas line, the plaintiff cannot recover, even if the defendant was negligent as claimed by the plaintiff in his declaration." For the same reasons given above for granting instructions 5, 6, 7, and 9, this No. 8 should have been given as presented, and without the modification by the court as given.

For the reasons herein given, there is error in the judgment complained of, and the same is reversed and annulled, the verdict of the jury set aside, and the case remanded to the circuit court for a new trial to be had therein.

Reversed.

CHARLESTON.

BENNETT v. PIERCE *et al.*

Submitted Sept. 15, 1898—Decided Dec. 14, 1898.

1. EQUITY PLEADING—*Answer.*

If an answer presents no bar to the bill, or contains some matter not material, exception should be made to it, pointing out defects, and not a mere general objection should be made. (p. 655).

2. VENDOR AND VENDEE—*Deed—Title—Insolvency.*

A purchaser who has accepted a deed of general warranty must generally pay the purchase money, and look to the warranty for indemnity against bad title; but if the grantor is insolvent, or the warranty not binding, he will not be compelled to pay, if the title is defective, though he has not yet lost from its defects. — (p. 657).

3. DEED—*Married Woman—Separate Estate.*

A deed for land by a married woman alone, as one living separate and apart from her husband, must recite that fact, as also the fact that the land is her sole and separate estate; otherwise, the deed is void. (p. 656).

4. DEED—*Married Woman—Acknowledgment—Separate Estate.*

A certificate of acknowledgment of a deed for real estate made by a married woman alone, as one living separate and apart from her husband, must state that it has been proven to the satisfaction of the officer that the real estate is the sole and separate property of the woman, and that she was at the date of the deed, and still is, at the date of the certificate, living separate and apart from her husband; otherwise, the deed is void. p. 656).

Appeal from Circuit Court, Barbour County.

Bill by Maggie Bennett against W. N. Pierce to sell a tract of land for purchase money. Pierce tendered an answer which was rejected. From a decree on the bill as confessed, defendant appeals.

Reversed.

45	654
150	518
50	605

45	654
e 51	492

45	654
53	316

45	654
j66	233

J. HOP WOODS, for appellant.

DAYTON & DAYTON and FRED O. BLUE, for appellees.

BRANNON, PRESIDENT:

This suit was in equity, in the circuit court of Barbour County, to sell a tract of land for purchase money, for which a lien was reserved in a deed from Maggie Bennett, the plaintiff, to W. N. Pierce, defendant, resulting in a decree of sale, from which Pierce appeals.

Pierce tendered an answer, which was rejected. The court went on to decree on the bill as confessed. The appellant assigns the rejection of this answer as error. The answer was rejected on mere general objection, no cause of objection being specified. I suppose it was intended as, in effect, a demurrer, asserting that the answer presented no bar. I question whether, under strict equity practice, an answer can thus be rejected without exception. Likely, if the answer presents no bar to the bill, its rejection on a general objection would be good on appeal. It would be dangerous if the answer contained some good, some bad, matters, as the overruling of a general objection would not then be error. There is no demurrer to an answer. Objection must be made by exception. Exceptions are not formal, but must be written and point out grounds of exception. It is better practice to use them, though I think the practice is loose with all of us in this State under this head. We let answers go in for what they are worth, and go on to proof on both sides, and spend much time and cost, and at last the whole answer, or parts of it, are held to present no bar. The court would, at the start, have rejected the whole or parts of the answer if called on by exceptions, and thus saved much cost and delay. By exceptions, we eliminate from the case answers presenting no bar in law, or such parts as do not, and shorten the case. 1 Enc. Pl. & Prac. 895; *Richardson v. Donehoo*, 16 W. Va. 685. And I just notice that JUDGE LUCAS entertained the same doubt I entertain, whether such an objection can avail a plaintiff, in *Arnold v. Slaughter*, 36 W. Va. 589, (15 S. E. 250). Such general objection may, under the liberal rules of equity practice, be good where it goes to the whole answer as presenting no bar, but will not avail where only some matters are objectionable.

Let us, then, see whether this answer presents a bar. It alleges that Mrs. Bennett derived title through certain deeds from parties who were heirs of John Dalton, some of them married women, and it points out that certificates of their privy examination were defective. One of these deeds, dated February 18, 1880, is fatally defective, in the fact that the certificate as to four married women omits the requisite statement, "and having the writing aforesaid fully explained to them." *Watson v. Michael*, 21 W. Va. 568. The deed of December 7, 1882, is bad because the justice certifies that Phebe Male and husband appeared together, and made a joint acknowledgment—bad under *McMullen v. Egan*, 21 W. Va. 233. And it is bad because in the second clause of the certificate it says: "And the said——, wi——of the said——, being at the time," etc., not giving name of husband or wife; rendering this second part, containing essentials, nugatory. The deed of February 6, 1884, is void as to Ary J. Barnes, as it does not show on its face that the land is her separate estate, and she living separate and apart from her husband. No authority is cited for this position, save section 3, chapter 66, Code 1868; but that seems all-sufficient. I have not met with any case. It is not necessary to give authority to show that at common law a married woman cannot convey land, and can now convey only as statute allows. Under our statute, a wife cannot convey even her separate land without her husband in some way uniting in the deed, except that, if she is living separate and apart from him, she may alone convey; but she must do so in the mode pointed out, and that is that the deed shall recite that the land is her sole and separate property, and that she is living separate and apart from her husband; and, further, the certificate of acknowledgment must show that it was proven to the satisfaction of the officer making it that such were the facts. These matters are not recited in this deed. I think, too, the certificate is defective in not stating that it was proven "to his satisfaction" that the property was her sole and separate property, and that she was living separate and apart from her husband; and the Code says that the certificate must state that "all of said facts were shown to the satisfaction" of the officer. It requires him

to say that the proof showed these facts to his satisfaction. It requires his finding on the evidence. Strictness is required, because it may turn out otherwise, and the deed be overthrown. The certificate merely says that Mrs. Barnes made affidavit that the land was her sole and separate estate, and hardly that she was living separate. As a married woman can only convey as statute points out, and the cases require close compliance with their requirements, I think this is a fatal defect. Every material fact must be stated in the certificate, to make a deed valid. 1 Am. & Eng. Enc. Law, 538. These are material facts. Deeds are not good if they do not exist. The justice must find them. These defects make these deeds null and void as to the married women. They never conferred their estates in the land.

Next comes the question, shall Pierce be compelled to pay the balance of purchase money with these grave defects in the title of his grantor? *Heavner v. Morgan*, 30 W. Va. 335 (4 S. E. 406), and *Heavner v. Morgan*, 41 W. Va. 428 (23 S. E. 874), would answer "No," as those cases say that equity will not force a purchaser to complete an executory contract, and pay purchase money, when there is a defect of title. But that was a case of an executory contract; this is a case of a deed with general warranty. Must the purchaser pay, and wait till he is attacked, and then resort to his warranty? There is a difference, but the subject is so trite that I will not rediscuss it, but simply refer to opinion in *McClougherty v. Croft*, 43 W. Va. 270, 272 (27 S. E. 246), showing that, where one accepts a deed with general warranty, he will not be compelled to pay purchase money, and thus lose a fund in his own hands for indemnity, where the grantor is insolvent, and title defective. There are two reasons why that law should be applied in this case. The answer alleges Maggie Bennett's insolvency. Under the general objection to the answer, it must, as if on demurrer, be taken as true. But it alleges, and it is shown by the deed, that Maggie Bennett is a married woman, and therefore her warranty does not bind her to the personal covenant of warranty, but only to pass her estate in the land. Code 1891, c. 73, s. 6; *Sine v. Fox*, 33 W. Va. 521 (11 S. E. 218).

Counsel would here draw a distinction, saying that this rule does not apply where the land is separate estate, and that in such case the covenant does bind the woman as if single, and that *Sine v. Fox* was not the case of a deed of separate estate. But there is the positive provision that such covenant shall not bind the wife, personally, and there is no exception of a deed for separate estate, though that section provides as to conveyance by a wife living alone, of her separate estate. Only the legislature can put such an exception in the statute. Here we must remember that by common law a married woman cannot contract. Whether by law at the date of this deed (June 27, 1895), this covenant would bind her, if it were not for section 6, chapter 73, limiting its effect, it is not necessary to say; but as to this particular contract that limitation stands in the Code unchanged.

Counsel argue that Pierce must wait till his title is attacked. Not so. He is a defendant seeking to keep in his pocket a fund for his indemnity.

Counsel for Mrs. Bennett also say that it has been seventeen years since these defective deeds were made, and that the rights of these married women were barred by limitation and laches. As to limitation: If this land was not separate estate, limitation would not operate against the married women until the death of their husbands; otherwise, if it were separate estate. Code, c. 104, s. 3; *Randolph v. Casey*, 43 W. Va. 289 (27 S. E. 231). The record does not tell us when John Dalton died, and the land vested in his children; whether it was before or after April 1, 1869. The husbands are presumed to be yet living. Moreover, there is nothing to show that Rolley C. Bennett, grantee in the defective deeds, or Pierce, grantee of Maggie Bennett, ever had actual possession. Deeds confer constructive possession; but, under the statute, actual possession must be shown by him asserting it. *Industrial Co. v. Schultz*, 43 W. Va. 470 (27 S. E. 255); *Koiner v. Rankin's Heirs*, 11 Grat. 420; *Overton's Heirs v. Davisson*, 1 Grat. 211; Busw. Lim. § 236. It is unquestionable that where a purchaser takes actual possession under a deed purporting to convey legal title, and not under an executory contract, the possession of grantee is

adverse to the vendor (*Core v. Faupel*, 24 W. Va. 238). Even if the deed is void *Randolph v. Casey*, 43 W. Va. 289 (27 S. E. 231); *Swann v. Thayer*, 36 W. Va. 46 (14 S. E. 423); *Mullen's Adm'r v. Carper*, 37 W. Va. 215 (16 S. E. 527).

So, if it should appear that John Dalton died after April 1, 1869, descent casting on his daughters a separate estate, and that Rolley C. Bennett and Pierce, taking their actual possession, had such possession for ten years, the married women would be barred, and time would cure the vice in said deeds; but the facts on which this proposition rests are not before us. It is not necessary to discuss laches of these married women, as it is a question of statutory limitation. If the statute does not bar out their title, laches will not; and, if the statute applies, it is useless to consider laches. This rejected answer presented a good bar to the bill until it was repelled, and it was error to reject it. We therefore reverse the decree, and remand the case, with direction to allow the answer to be filed.

Reversed.

CHARLESTON.

BUTLER v. THOMPSON.

Submitted Sept. 15, 1898—Decided Dec. 14, 1898.

45	680
45	610
45	680
48	101
48	688
45	680
52	312
52	603
45	680
54	404
45	680
55	497
55	502
45	680
66	215

1. FRAUDULENT CONVEYANCE—*Evidence—Burden of Proof.*

Where a suit is brought by a creditor assailing a transfer of property by his debtor as fraudulent and made with intent to hinder, delay, and defraud him in the collection of his debt, the proof of fraud rests on the party who alleges it, but circumstances may exist which will shift the burden of proof from the party impeaching the transaction onto the party upholding it. (p. 667).

2. FRAUDULENT CONVEYANCE—*Suit Pending.*

A conveyance made by a party of his entire property during the pendency of a suit brought to recover judgment against him on a debt is a badge of fraud. (p. 668).

3. FRAUDULENT CONVEYANCE—*Deed—Consideration—Evidence—Burden of Proof.*

Where the creditor of a grantor assails in a chancery suit a deed made by a grantor as voluntary and fraudulent, the recitals of the deed that the grantee had paid the grantor a valuable consideration are not evidence against the creditor of such payment, and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor. (p. 666).

4. FRAUDULENT CONVEYANCE—*Deed—Consideration—Burden of Proof.*

Where a creditor files a bill to set aside as fraudulent a deed executed by his debtor which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money, or, if the deed was executed for the payment of existing debts, to prove the validity of such debts. (p. 667).

5. FRAUDULENT CONVEYANCE—*Family Relations.*

Where a conveyance of property by an uncle to his nephew is assailed as fraudulent as to creditors, the parties are held to a fuller and stricter proof of the consideration and of the fairness of the transaction than if the conveyance was between strangers. (p. 668).

Appeal from Circuit Court, Tucker County.

Bill by J. P. Butler against J. F. Thompson to set aside a fraudulent conveyance from a decree dismissing the bill, complainant appeals.

Reversed.

W. B. MAXWELL and C. O. STRIEBY, for appellant.

DAYTON & DAYTON and FRED O. BLUE, for appellee.

ENGLISH, JUDGE:

On the 27th day of December, 1892, J. P. Butler obtained a judgment against John F. Thompson for the sum of four hundred and ten dollars and sixty cents, before a justice of the peace of Tucker County, on which an execution was issued and placed in the hands of a constable, and returned by him, "Money not made, and no property found." Said Butler thereupon filed his bill in the circuit court of said county, alleging therein that at the time he brought his suit before the justice said Thompson owned a very valuable shingle and board mill worth about one thousand and five hundred dollars situated in said county, and also owned another saw mill worth about one thousand dollars situated in the town of Davis, and other valuable personal property, such as saw logs, shingles, boards, lath, and other lumber, and lumbermen's tools, of the probable value of two thousand dollars; and, in addition to said property. Thompson and his wife were joint owners of a valuable house and lot in the said town of Davis, known as lot No. 305 on the plat of said town; that, during the pendency of said suit before the justice, Thompson, on the 15th of December, 1892, pretends to have sold the whole of said property to his nephew Frank E. Thompson, receiving six hundred dollars cash for said house and lot in Davis; that he is not informed what said F. E. Thompson claims to have paid for said personal property, but that he now claims

the whole thereof by the terms of his purchase; that the pretended transfer of said property, which was intended to cover all the property both real and personal owned by said John F. Thompson, was made for the purpose of hindering, delaying, and defrauding the creditors of said J. F. Thompson, and especially for the purpose of defrauding the plaintiff, and that said Frank E. Thompson had full notice and knowledge of his fraudulent intent and assisted and participated therein, and is now endeavoring to assist in the consummation of said fraudulent intent, and is endeavoring to prevent the plaintiff from recovering the amount of his said judgment; that J. F. Thompson and his family yet have possession of the house, and occupy the same, which was conveyed to F. E. Thompson as aforesaid; that said J. F. Thompson still manages and controls as his own the mills and personal property transferred by him to F. E. Thompson, and, so far as any visible sign of change of ownership goes, there has been none, except that F. E. Thompson claims the property as his, and J. F. Thompson claims to have sold the same; that, in their hurry to make transfers of all the property owned by said J. F. Thompson, a one-seventh interest in lot No. 20 in Davis was overlooked, and said J. F. Thompson is the owner thereof, as shown by deed from S. Maude Thompson to said J. F. Thompson and others; that the plaintiff caused his said judgment to be promptly docketed in said county, and the same is a lien upon the one-seventh undivided interest in said lot No. 20; that the rents and profits of the interest of said J. F. Thompson in lot No. 20 would not satisfy plaintiff's judgment in five years; that there are no other liens by judgment or otherwise against said lot No. 20, and no reference would be necessary to ascertain the liens and priorities; that no part of said judgment has even been paid; and he prayed that the interest of John F. Thompson in said lot might be sold to satisfy said lien, and in case it did not sell for enough to satisfy said judgment and costs that then the deed from John F. Thompson and wife to Frank E. Thompson be annulled, set aside, and canceled as fraudulent as to the one-half interest of said J. F. Thompson therein, and that the pretended sale and transfer of his personal prop-

erty to Frank E. Thompson be set aside as fraudulent, the interest of J. F. Thompson in said lot sold, and F. E. Thompson required to account for the value of said personal property, or a sufficient amount to satisfy the plaintiff's demands and costs. The defendant, J. F. Thompson, answered the plaintiff's bill, suggesting that he should amend it and make the Davis Hardware & Furniture Company, a corporation, an additional party, for the reason that, at the time the lot mentioned in plaintiff's bill as No. 20 in Davis was purchased by respondent and six others, it was the purpose and intention of said parties to form said corporation for the purpose of carrying on a merchantile business, and respondent and six others were the promoters of said corporation, and said lot was purchased by them for said corporation before the charter was granted; that it was paid for by the promoters, but as soon as said charter was granted the same was by verbal contract turned over to said corporation, and said promoters were paid for their outlay in purchasing it; that said corporation took possession of said lot and improved it by the erection of valuable buildings thereon, and from that time, long before the recovery of plaintiff's judgment, said property has been in possession of said corporation, and respondent has no interest therein; that the conveyance to respondent and six others was nothing but a trust for said corporation; that the possession and notorious claim of title by said corporation to the property was notice to said plaintiff, and no decree can be entered in this case affecting said property until said corporation is made a party. At February rules, 1894, the plaintiff filed an amended bill making said corporation a party, and repeated his allegation as to his being a creditor of said John F. Thompson, and his right to have his interest in said land subjected to sale to satisfy his judgment; and alleged that, while it might be true that said real estate was purchased for and intended to be used by said corporation, it was never the intention that said real estate was to be conveyed to said corporation, but was intended to be held by the grantees; that while the agreement to form said corporation was made March 21, 1892, and recorded the 24th of March, the certificate was issued on April 2, and recorded May 11, 1892, and the deed to J.

F. Thompson and others was acknowledged on the same day and was not delivered for more than forty days thereafter, and was not recorded until June 22d, and said J. F. Thompson has never conveyed his interest in said land to said corporation, and he has the right to have the same sold to satisfy his judgment. Said corporation filed its answer denying that J. F. Thompson had any interest in said lot No. 20, and adopted the answer of J. F. Thompson thereto; and J. E. Thompson in his answer to said amended bill claimed that he made a *bona fide* sale to Frank E. Thompson for the purpose of paying his debts, and offered plaintiff his *pro rata* share, which he declined to receive; denied any interest in said lot, and claimed that he was only a trustee for said company. Frank E. Thompson also answered, denying the allegations of the bill as to himself, and denying that J. F. Thompson remained in possession of the property after the sale to him. These answers were replied to generally, depositions were taken on behalf of the defendant J. F. Thompson, and on March 14, 1895, the cause was heard, and the bill dismissed. The plaintiff obtained this appeal.

The only error assigned is as to the action of the court in dismissing the bill, which assignment is comprehensive and involves an examination of the entire case. Let us inquire first as to the right asserted by the plaintiff to subject the undivided one-seventh of lot No. 20 in the town of Davis to sale to satisfy his judgment. It appears from the testimony that the defendant, J. F. Thompson, and six others, promoters of a contemplated corporation chartered under the name of the Davis Hardware & Furniture Company, shortly before the same was chartered purchased said lot No. 20 for the use of said corporation, and a place on which it might erect such buildings as were needed in the transaction of its business, and they received the title merely as trustees for said corporation, and that some time before the plaintiff's suit was brought or his judgment obtained the parties thus having acquired the title and holding said lot by verbal contract turned the possession of said lot over to said corporation, and sold the same to it. This corporation at once paid for the lot and erected improvements upon it, and has been in open notorious,

and exclusive possession of it ever since. Although the contract was verbal, it was fully performed on the part of the corporation, and it had the right to call for a deed, the defendant and those who jointly hold the title being merely trustees. Now, as between the appellant and the Davis Hardware & Furniture Company, the law appears to be clearly and definitely settled in the case of *Snyder v. Martin*, 17 W. Va. 276 (Syl. point 6), where the Court held that: "A purchaser of land by parol contract which has been so far executed as to vest in him the right to compel his vendor to execute the parol contract in a court of equity has an equitable right in said land so purchased which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor." The same is held in the case of *Peck v. Hansbarger, Id.*, 313. Syl. Now, as to what is required to entitle a party to specific performance this Court held in the case of *Vickers v. Sisson's Adm'r*, 10 W. Va. 12, that "where a plaintiff files his bill for the specific performance of a verbal contract for the purchase of land, setting forth specifically the contract, the amount of the purchase money, and that the same had been paid to the vendor, that the plaintiff was in possession of said land at the time of the purchase, and had made valuable improvements thereon upon the faith of said contract, these allegations, if sustained by satisfactory proof, will entitle the purchaser to a specific performance of the contract in a court of equity, notwithstanding the statute of frauds." These rulings, applied to the facts disclosed by the record in this case, lead me to conclude that the plaintiff had no right to have said lot No. 20 subjected to sale in satisfaction of his judgment.

Let us now consider the other transaction, which the bill charges to be fraudulent in this: That the transfer of the property in the bill mentioned and described as a valuable shingle and board mill worth about one thousand five hundred dollars, situated in the town of Bretz, in said county, another mill worth about one thousand dollars in the town of Davis, and other valuable personal property therein described worth about two thousand dollars, also a house in the town of Davis on lot No. 305, held jointly by said J. F. Thompson and his wife, was made with intent

to hinder, delay, and defraud the creditors of the defendant, J. F. Thompson, and especially to hinder, delay, and defraud the plaintiff. In determining a question of this character we must look to the facts and circumstances immediately surrounding the transaction, and in doing so we find the plaintiff's action before the justice was instituted on the 10th of December, 1892, the summons was made returnable to the 17th, and appears to have been served upon the defendant, J. F. Thompson, who appeared, and the case was continued until the 27th by consent. On December 15, 1892, J. F. Thompson and wife conveyed to his nephew Frank E. Thompson in consideration of six hundred dollars by their deed of that date, lot No. 405 in the town of Davis, on which was J. F. Thompson's dwelling house, which deed was put on record on the 17th of December, the day said case was continued. Now, it must be regarded as somewhat singular that after the plaintiff's suit was brought before the justice, and on the very day to which the process was returnable, the defendant, J. F. Thompson, should be seized with a sudden inclination to dispose of all his property, real and personal, even the roof over his head, with a view of paying off all his debts; and he alleges in his answer that he offered to pay the plaintiff his *pro rata* share, but the plaintiff declined to receive it. This answer was replied to generally, and the allegation is unsustained by proof. As to the payment of a valuable consideration by the grantee where the deed is attacked by a creditor as voluntary and fraudulent, several decisions of this Court have announced the doctrine as follows: "Where the creditor of a grantor assails in a chancery suit a deed made by a grantor as voluntary and fraudulent, the recitals of the deed that the grantee had paid the grantor a valuable consideration are not evidence against a creditor of such payment, and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor." See *Rogers v. Verlander*, 30 W. Va. 619, (5 S. E. 847); *Cohn v. Ward*, 32 W. Va. 34, (9 S. E. 41); *Childs v. Hurd*, 32 W. Va. 100, (9 S. E. 362); *Himan v. Thorn*, 32 W. Va. 507, (9 S. E. 930). It has also been held in this State that where a creditor

files a bill to set aside as fraudulent a deed executed by his debtor which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money, or, if the deed was executed for the payment of existing debts, to prove the validity of such debts. See *Knight v. Capito*, 23 W. Va. 639. Now, the defendant, F. E. Thompson, in his answer alleges that the purchases were made by him in good faith for a full and complete consideration, and without fraud or fraudulent intent. The general replication, however, puts this in issue, and there is no proof to sustain it; and besides, as we have seen, the burden of proof in the circumstances of this case as to the payment of the purchase money is on the grantee; yet neither he nor his uncle takes the stand as witnesses to support the allegation. It is alleged in the bill, and not denied by the answers, that on the 15th of December, 1892, J. F. Thompson sold the whole of his property to his nephew Frank E. Thompson. The defendant, J. F. Thompson, in his answer admits that he sold all his property, real and personal, but says affirmatively, by way of excuse, that he was indebted to certain creditors in the North, and, being anxious to pay them, he sold his interest in said lot and personal property to F. E. Thompson, a man of large means then extensively engaged in the lumber business, for a full consideration; but, so far as the proof goes, there is nothing to show that J. F. Thompson owed a dollar except to plaintiff; neither is there a particle of evidence to show that said F. E. Thompson was worth a cent or that he ever paid any consideration for the property. In the case of *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717, it was held that "if the facts established afford a sufficient and reasonable ground for drawing the inference of fraud, the conclusion to which the proof tends must, in the absence of explanation or contradiction, be adopted;" also that "though the proof of fraud rests on the party who alleges it, circumstances may exist to shift the burden of proof from the party impeaching the transaction onto the party upholding it." Speaking of relationship, Bump on Fraudulent Conveyances (section 67) says: "Relationship is not a badge of fraud. Fraud, however, is general-

ly accompanied with a secret trust, and hence the debtor must usually select a person in whom he can repose a secret confidence. The sentiments of affection commonly generate this confidence, and often prompt relatives to provide for each other at the expense of just creditors. Consequently relatives are the persons with whom a secret trust is likely to exist. The same principle applies to all persons with whom the debtor has confidential relations. Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain, or gives color to the transaction." And, in enumerating the relations to which the doctrine applies, uncle and nephew are mentioned, and he adds: "Whenever this confidential relation is shown to exist, the parties are held to a fuller and stricter proof of the consideration and of the fairness of the transaction." The same author (section 50) says: "The expectation or pendency of a suit is a badge of fraud, because a transfer tends to deprive the creditor of the means of enforcing his judgment when he obtains it. If an attorney who holds a claim for collection is induced to delay the institution of a suit at the request of the debtor, who thereupon takes advantage of the delay to make a conveyance, this is a badge of fraud the same as if the suit were actually pending. The pendency of a suit, however, is merely a badge of fraud." In the case under consideration the suit was pending, and on the 17th of December was continued by consent, and on that day the deed was recorded. As we have seen, the pendency of the suit at the time of the conveyance was a badge of fraud. *Bump on Fraud*. Conv. s. 66, says: "The grantee need not prove the payment of the consideration until the fraudulent intent of the grantor is shown, but when that is shown it is incumbent on him to establish the payment by competent evidence, for the proof is almost exclusively within his knowledge and power. * * * The facility which a fictitious payment may be fabricated renders it necessary for him to produce all the proof which may reasonably be supposed to be in his power of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud." As to notice of fraudulent intent on the part of the grantee

the same author says in section 184, p. 212: "If the grantor and grantee are relations or are intimate, this is a fact from which it may be inferred that the latter knows the former's financial condition,—citing *Castro v. Illies*, 22 Tex. 480. In the case of *Herzog v. Weller*, 24 W. Va. 199, it appears that an insolvent husband transferred to his wife's brother for an alleged valuable consideration all of his personal property. Soon afterwards the brother transferred the said property to another brother, and the latter transferred it to his sister, the wife of said insolvent husband, as a gift in consideration of fraternal affection. In a controversy between the wife and the husband's creditors to have said property subjected to the payment of debts contracted by the husband before the transfer by him, the court held that "the burden of proving the transfer by the husband to the brother was *bona fide* and for a valuable consideration rests upon the wife." The circumstances immediately surrounding this transaction—the pendency of the suit, the relationship of the grantee, the transfer of the entire property, real and personal, including the home of the grantor, when a judgment is about to be taken against him—are indications of a fraudulent intent. The near relationship or business relations of the grantee with the grantor are such as to cast the burden of proving the payment of consideration and the *bona fides* of the transaction upon said J. F. Thompson and his nephew Frank E. Thompson, and yet neither of them came forward as a witness to sustain the transaction or show that a valuable consideration was paid. These circumstances, in my opinion, stamp the sale of said house and lot No. 305 and personal property as fraudulent, and induce me to hold that the conveyance and transfer of them were made with intent to hinder, delay, and defraud the plaintiff in the collection of his debt, and that they are therefore void as to the plaintiff's judgment. The decree of the circuit court dismissing the plaintiff's bill is therefore reversed, and the cause remanded.

Reversed.

CHARLESTON.

DEATON *et al.* v. MITCHELL *et al.*

Submitted Jan. 22, 1898—Decided Dec. 14, 1898.

1. SUPREME COURT OF APPEALS—*Jurisdiction.*

Where a decree merely pecuniary, and for not over one hundred dollars, is reversed on bill of review or petition for rehearing, this Court has no jurisdiction of an appeal from the decree of reversal. (p. 670).

2. APPEALABLE DECREE.

A decree which adjudicates all the principles of a cause and settles the rights of the parties, leaving nothing further to be done but execute it, is such a decree as will support an appeal from a decree which grants a rehearing of the first decree. (p. 671).

Appeal from Circuit Court, Mercer County.

Bill by C. A. Deaton & Co. against E. M. Mitchell and others. From the decree, plaintiffs appeal.

Dismissed.

JOHN A. DOUGLAS, D. W. MCCLAUGHERTY, and COUCH, FLOURNOY & PRICE, for appellants.

JOHNSTON & HALE, for appellees.

BRANNON, PRESIDENT:

Before considering a case before it on its merits, this Court must consider its jurisdiction, especially as it is in this case challenged. We have no jurisdiction of this appeal. It was a suit to enforce a judgment lien upon land. On reference to a commissioner to ascertain liens, only two were reported, and they were decreed against the

land, and it was decreed to sale; one being to the Bank of Bramwell, the other to C. A. Deaton & Co., and each less than one hundred dollars, that of Deaton & Co. being ninety-seven dollars and sixty-one cents. The debt of the bank was paid, as shown by a record entry, though this is not material. Afterwards, on a petition assigning errors in former decree, filed by defendants, the decree of sale was set aside, and a rehearing was allowed. Deaton & Co. obtained from a judge of this Court an appeal. Deaton & Co., if aggrieved at all, are aggrieved in a matter purely pecuniary, and the amount is less than one hundred dollars, excluding costs, as the decree granting rehearing took away from them ninety-seven dollars and sixty-one cents. Where the controversy is purely pecuniary, the amount must exceed one hundred dollars, exclusive of costs. *Berry v. Cunningham*, 37 W. Va. 302 (16 S. E. 463); *McClagherty v. Morgan*, 36 W. Va. 191 (14 S. E. 992). It is claimed, further, that for another reason we have no jurisdiction, and that is that the decree confirming the commissioner's report, decreeing the debts against the debtor and his land, is not a final decree; and that, while Code 1891, c. 135, s. 1, cl. 9, gives a writ of error or appeal "in any civil case where there is an order granting a new trial or rehearing," without waiting for such new trial or rehearing, yet this is only where the decree reheard is a final one. That decree was likely, in full sense, a final one, as it only remained to execute it by sale; but certainly it was so far a final one as to come under said clause granting appeal where rehearing has been granted. That decree adjudicated the principles of the cause, fixed the rights of the parties as to all matters in the case on which relief could be granted, and is so far final that it is an appealable decree, and will support a bill of review. It left nothing to settle. *Core v. Strickler*, 24 W. Va. 689; *Rader v. Adamson*, 37 W. Va. 582 (16 S. E. 808); *Shumate v. Crockett*, 43 W. Va. 491 (27 S. E. 240); *Buster v. Holland*, 27 W. Va. 510; *Cocke's Adm'r v. Gilpin*, 1 Rob. (Va.) 20; *Rawling v. Rawling*, 75 Va. 83. Very clearly the same intention moved the enactment of clause 9, as respects new trial and rehearing, the one in law, the other in chancery; and that was to change the old law forbidding a writ of error or

appeal till final judgment or decree, and, by anticipating them, allow a writ of error at law where a verdict is set aside, and a rehearing in chancery where there has been a decree settling the principles of a cause, so as to have the appellate court pass on the merits of the case without the delay and expense of new trial or rehearing. It was intended to let a party deprived of the jury's decision or the court's decision on the merits in his favor appeal at once. Strange that a decree so far final as to allow a bill of review or appeal should yet not be final enough to allow an appeal to test the right to grant a rehearing. This would defeat the manifest aim of the clause. If, therefore, a decree adjudicates the principles of the cause, so that it only remains to execute the adjudication, a rehearing gives right to appeal. Whether it must adjudicate all the matters involved, I do not say. This decree did so. Indeed, it may be that this clause was intended to go further, and give appeal from a rehearing where the decree is interlocutory, yet decides some principles directing and controlling further final decision, though not appealable or open to bill of review; in other words, where a petition for rehearing, properly so called, and not an appeal or bill of review, lies. But as this decree closed all the matters involved, that question does not arise, and I have not examined it. In fact, the decree being final, the pleading called a petition for rehearing is a bill of review, and it cannot be questioned that a decree disposing of a bill of review will support an appeal, if the requisite pecuniary amount is present, where the decree reviewed is merely pecuniary. The name given the paper is no matter. *Martin v. Smith*, 25 W. Va. 579; *Crumlish Case*, 40 W. Va. 659 (22 S. E. 90).

Dismissed for want of jurisdiction.

Dismissed.

CHARLESTON.

KEARFOTT v. DANDRIDGE *et al.*

Submitted Sept. 12, 1898—Decided Dec. 14, 1898.

1. DECREE—*Finality of Decree—Statute of Limitations—Appeal.*

A decree providing for the distribution and payment of money is a final decree, and subject to the statute of limitations relating to appeals, bills of review, and motions to correct nonappealable errors. (p. 676).

2. EQUITY—*Decree—Distribution of Funds.*

If a court of equity takes charge of a large fund brought into a chancery cause, and enters a general decree providing for the proportionate distribution of such fund among the distributees entitled thereto, and in subsequent and intermediate decrees relating to portions of such fund it apparently departs from such apportionment, in its final distribution of the residue of such fund it should so equalize the same as to make such final decree, including all intermediate decrees, conform to the general decree. (p. 679).

3. EQUITY—*Distribution of Funds—Distributee's Rights.*

If one of a number of distributees purchases a portion of the property subject to such fund in such suit, she is entitled to have her distributive share applied as a credit on her purchase money notes in the final distribution of the fund, and the court may make such application without her consent. (p. 678).

Appeal from Circuit Court, Jefferson County.

Bill by John P. Kearfott, trustee, against A. S. Dandridge and others. A decree was rendered, from which Serena C. Dandridge appeals.

Reversed.

MCDONALD & BECKWITH, for appellant.

JOSEPH TRAPNELL, for appellee.

DENT, JUDGE:

In the case of John P. Kearfoot, trustee, against A. S. Dandridge and others, from the circuit court of Jefferson County, Serena C. Dandridge, appellant, presents some intricate questions of law relating to the management, control, and distribution of the fund brought into said cause, and of which she was one of the distributees. By a general decree, which is not made a part of the record, the circuit court settled the principles of the cause, determined the rights of the distributees, and fixed the basis on which the fund thereafter to be brought under the control of the court by the sale of certain lands was to be apportioned among them. From time to time certain several creditors of the several distributees, in addition to the creditors originally made parties to the suit, filed their *ex parte* petitions, and, together with all other lienors, were allowed their debts against the several distributive shares liable thereto. The lands were sold, and from time to time intermediate decrees were entered disposing of the fund as it accumulated. The appellant became a purchaser of one of the tracts of land sold, paid the down payment, and executed her notes for the residue of the purchase money. When she was finally called on to pay her last purchase-money note, never having received her distributive share of such fund, she filed her petition, asking that the same might be applied in satisfaction of such note according to the original decree of apportionment. The circuit court refused to grant her prayer for the reason, as stated in the decree, "that there are no errors apparent in the said decrees of November 18, 1896, and February 24, 1897, or any of the former decrees, which it is in the power of the court to correct;" and a decree was rendered requiring her to pay the balance on the purchase money without giving her credit for her distributive share, which, according to the report of Commissioner Brown, deducting therefrom wrongful costs imposed upon her, was more than sufficient to satisfy such balance of purchase money. This presents the anomalous case of the court of chancery, if Commissioner Brown's report be true, taking charge of a fund, and so distributing it from time to time, by its in-

intermediate decrees, in such manner as to defraud one of the distributees. All the decrees are not before the Court, but only such as the appellant deemed proper, so the Court is deprived of information it should have, contained in those missing decrees. The principal matter of contention, however, in the circuit court, was over the decree entered December 12, 1889, which is as follows: "This cause came on again this 12th day of December, 1889, to be further heard upon the papers formerly read, and the reports of Special Commissioner Blackburn Hughes,—one filed November 28, 1888; also the one filed March, 1889; and the other this day filed by leave of the court,—showing the collection of the balance of purchase money due by the purchasers, Joseph Fiscus, Mrs. Isabella L. Dandridge, and John Burns, amounting to \$1,543.98; and upon the report of Commissioner Cleon Moore returned and filed November 12, 1889, ascertaining the distribution of the fund heretofore collected and disbursed; and the report of said Commissioner Moore returned at this term, apportioning the fund in the hands of special commissioner; and was argued by counsel; and, there being no exception to said report, the court doth affirm the same, and doth adjudge, order and decree that said Special Commissioner Hughes, after deducting his commissions of \$65.31, and retaining \$20 for unpaid costs of suit, etc., \$5 for writing deed to purchaser, do distribute the balance in his hands as follows: Taxes, \$79; to Miss Sarah P. Dandridge. \$200; Serena Dandridge, \$122; to surveyor's fees, \$21; to commissioner's fee, \$4.50; to Collin C. Porter's executors, \$53.79, balance of debt, which is a lien upon the interest in the fund of said Sarah P. and Serena C. Dandridge; and to Joseph Trapnell, attorney of Houser & Drawbaugh, \$969.35, on account of the debt audited in favor of said H. and D., which is a lien upon the interest of Lemuel P. Dandridge in the fund; leaving a balance of \$3.93 in the special commissioner's hands; and make report to the next term. Said special commissioner is also directed to deliver a deed to John Burns, the purchaser, who has paid in full as above recited, reserving through his land the road from the land sold Serena C. Dandridge. Upon motion of Flick & Westenhaver, attorneys

for some of the creditors, it is further adjudged, ordered, and decreed that a rule be issued, returnable to the first day of the next term of this court, against Serena C. Dandridge, the purchaser of the 307-acre tract, to show cause why said real estate shall not be resold to pay the two deferred payments of purchase money due from her thereon."

The appellee contends that this is a final decree, and has passed beyond the power of the court as to the disposition of the fund thereby made. A decree for the payment of money is a final decree, and is conclusive as to the questions thereby determined. Code 1891, c. 135, s. 1, cl. 7; *Core v. Strickler*, 24 W. Va, 689. The decree itself must show its conclusiveness.

As to the sum of money brought into court by its commissioner, and the payment and distribution thereof to the various parties named, it is final and conclusive; but as to the basis of distribution it is not, for it does not pretend to settle this question, already determined by a former decree of the court. The apparent distribution of the fund is not made in accordance with said decree, but according to some equitable basis presented to the court by the commissioner. This report being lost, it is impossible for the court to say what it was, but it is compelled to accept the decree as it finds it. By the decree, Sarah P. Dandridge is allowed two hundred dollars, Serena C. Dandridge one hundred and twenty-two dollars, and fifty-three dollars and seventy-nine cents balance on debt of Colin C. Porter, paid for their benefit, and Lemuel P. Dandridge nine hundred sixty-nine dollars and thirty-five cents to be paid on the debt of Houser & Drawbaugh. These sums, if allowed as distributive shares, are entirely variant to the apportionment provided in the original decree, and the court must have departed therefrom for some reason apparent to itself, with the intention of equalizing it in future management of the fund. According to the original decree, appellant was entitled to a little less than one-sixth, while Lemuel P. Dandridge was entitled to a little less than twice as much as appellant, yet by this decree he is allowed over six times as much; showing plainly that the court, for some reason, was not following the original apportionment. It may

have been from the reason that she had not paid her purchase money notes, and that she would be allowed her due proportion out of them as a credit thereon. If the original apportionment had been carried out after two of the distributees had received their portion, and dropped out of the distribution, as it appears they early did do, by the absorption of their shares in the payment of their debts, the fund should have been divided, one-fourth to appellant, one-fourth to Sarah P. Dandridge, and two-fourths to L. P. Dandridge. This one hundred and twenty-two dollars may have been some charge or debt allowed her as against the other distributees, to be credited on her notes, about which, however, it is useless to conjecture in the absence of proof. The decree shows she was to receive one hundred and twenty-two dollars out of this fund, and to this extent it is final and conclusive. She denies its receipt by her, and presumptively it was not paid, but, in accordance with the rules of equity, was retained by the commissioner as a credit on her notes held by him, and is still among his effects or was paid out by him for the benefit of the other distributees unless since his death it has been received by his successor.

On the 19th day of December, 1890, the court entered the following decree: "This cause came on again this 19th day of December, 1890, to be further heard upon the papers formerly read, and was argued by counsel; and it being suggested to the Court that Special Commissioner Blackburn Hughes has departed this life since the rendition of the last decree of December 12, 1889, in the cause, it is adjudged, ordered, and decreed that Joseph Trapnell be, and he is hereby, appointed special commissioner in the stead of the said Blackburn Hughes, deceased, with instructions to demand and receive from the personal representative of the said Hughes any balance remaining in his hands under the said decree of December 12, 1889, and the bonds on the deferred payments on the parcel of land purchased by Serena C. Dandridge; but, before receiving any money hereunder, said special commissioner will execute a bond before the clerk, with security to be approved by him, in the penalty of \$2,000. It is further adjudged, ordered, and decreed that a rule issue, returnable to the

first day of the next term, against the said Serena C. Dandridge, the purchaser of the said tract of 307 acres, in the proceedings mentioned, to show cause why the said real estate shall not be resold to pay the two deferred payments of purchase money due from her thereon."

By this decree said commissioner was authorized to receive from the personal representative of his predecessor said one hundred and twenty-two dollars, if still in his hands to credit of the fund. The appellant could not enforce its payment while her purchase-money notes remained unpaid. This is a matter of judicial inquiry for the court. If this sum, with or without the consent of the appellant, was retained in the hands of Special Commissioner Hughes as a credit on her notes, it became a part of the funds of the suit, which his successor had the right to demand and receive under the order of the court, and she would be entitled to credit therefor. Whatever the determination as to this fund may be, the decree of the 12th of December, 1889, does not bar or in any way prevent appellant from demanding and having assigned to her, as a credit on her purchase money, her rightful apportionment of the whole fund on the original basis fixed after the payment of the debts with which her share was charged. The various decrees entered in the case must show this, without resort to any of the reports made by the different commissioners, for no funds brought into the cause could be paid out without a proper decree therefor. The decrees must show the amount applied to the benefit of each of the distributees, and therefore which of them have received their full shares, and which of them are entitled to the residue of the funds arising from appellant's purchase and still under the control of the court. Sarah P. Dandridge, afterwards Hughes, has never received her just apportionment of the fund, so far as the decrees show; yet a creditor of L. P. Dandridge, one of the distributees, is permitted to take the whole balance of the fund, without, any consideration of the rights of the two unpaid distributees. The creditors of the other distributees have no right to subject the share of the appellant to the payment of their debts, but her right to the fund in controversy for the satisfaction of her distributive share is entitled to priority,

by reason of the original decree settling the principles of the cause, to which all the subsequent decrees, being merely in extension of the principles therein settled, must as a whole, be made to conform by the decree entered as a finality. Such being the case, the circuit court was called upon to review the former decrees as a basis, and the intermediate decrees as evidence of what had been done in pursuance thereof, to so equalize the distribution of the balance of the fund as to carry out the rightful apportionment provided for in the beginning. This is equity, and this is what this appellant had the right to demand. It is a mere matter of statement and calculation from the various decrees, and does not need the assistance of the lost reports. Out of a certain fund she and others are to receive certain proportions. She has never received anything except certain sums applied on her liabilities by the court, and now it is claimed there is nothing due her. This, if true, the decrees should show; otherwise she is entitled to such proportion of her share as they fail to show was applied for her benefit. The real question in dispute is whether the fund in controversy belongs to the distributive share of L. P. Dandridge, Serena C. Dandridge, or the estate of Sarah P. Hughes, deceased. If his creditors have already received L. P. Dandridge's full share, they are entitled to no more, although their debts remain unpaid. The decrees are the best evidence of this, as well as to all the other distributees, and the court should be able to trace the full disposition of the fund from them, so as to arrive at a correct conclusion and disposition of this case.

Appellant's petition fails to make necessary parties thereto all parties claimants to such fund, and should be amended in this respect. *Railroad Co. v. Vanderwerker*, 33 W. Va. 191, (10 S. E. 289); *Marshall's Ex'r v. Hall*, 42 W. Va. 641, (26 S. E. 300).

The decree of the 9th day of March, 1898, is reversed, at the costs of Craven Trussel's executor, representing the distributive share of L. P. Dandridge and the cause is remanded to the circuit court for further proceedings according to the rules of equity.

Reversed.

CHARLESTON.

RALPHSNYDER *v.* SHAW *et al.*

45	680
61	186

Submitted Sept. 15, 1898.—Decided Dec. 14, 1898.

1. CONTRACTS—*Trustee—Fraud—Sale of Land.*

Where a trustee is proceeding to make sale of real estate at public auction, and R. and B., after competing as bidders for some time, enter into a verbal agreement that R. shall desist from bidding, and B. should proceed as advised from time to time, and, if B. became the purchaser, he was to divide the property purchased with R., such an agreement is a fraud upon the vendor, and, if B. refuses to comply with the agreement, it cannot be enforced R. (p. 685).

2. CONTRACTS—*Sale of Land—Public Policy.*

A contract of this character is void, as being contrary to public policy. (p. 686).

3. STATUTE OF FRAUDS—*Sale of Land—Trustee.*

Where a sale of real estate is made by a trustee, and no memorandum is made in writing by the trustee, such sale is void under the statute of frauds. (p. 686).

Appeal from Circuit Court, Preston County.

Bill by J. C. Ralphsnyder against Leroy Shaw and another. Decree for plaintiff, and defendants appeal.

Reversed.

P. J. CROGAN and JAMES A. BROWN, for appellants.

R. W. MONROE and C. P. GUARD, for appellee.

ENGLISH, JUDGE:

On the first Monday of May, 1897, J. C. Ralphsnyder filed his bill in the circuit court of Preston County, against

Leroy Shaw and Henry Clay Hyde, trustee, William G. Brown and James A. Brown, basing his claim for relief on the following facts, to-wit: That said James Brown, on the 1st of March, 1897, made an assignment under a deed of trust to said Hyde and Shaw, trustees, purporting to convey all his estate, real and personal, in trust to said trustees for the benefit of his numerous creditors; that said trustees advertised said property for sale on the 5th of April, 1897, and in pursuance of said advertisement said trustees, on said 5th of April, proceeded to sell said property, Leroy Shaw acting as auctioneer or crier of the property at said sale, and, not having completed sale on the 5th, the same was adjourned until April 6th, said Shaw, continuing to act as auctioneer, and said Hyde as clerk; that, after many articles had been offered and sold, said trustee offered certain portions of the real estate in parcels or lots, and also the brick dwelling house in the town of Kingwood, together with the lawn surrounding the same, and the garden and orchard adjacent thereto, and the pasture field and wheat field contiguous and adjacent thereto, with the understanding that the aggregate price of said real estate by lots and parcels should bring as much as it brought as a whole; that said trustee offered said real estate first in parcels, and it brought the aggregate price of four thousand four hundred and fifty-three dollars; afterwards it was offered by them as a whole, and brought four thousand four hundred and seventy-five dollars. The plaintiff further alleged that he had an arrangement with the defendant W. G. Brown by which he and Brown were to buy said property jointly; that said Brown was to do the bidding, and buy the property in, and plaintiff was to stand by for the purpose of indicating to said Brown how much to bid on said property, and Brown was to stop when so directed by plaintiff; that under this agreement said Brown bid the property up to four thousand four hundred and seventy-five dollars, which bid was acquiesced in by plaintiff, and the property was knocked down to Brown; that he notified the said trustees that the sale was made to himself and Brown jointly, and that he was ready to comply on his part with the terms of sale, and that he would see

Brown, and fix it up; that he did call on Brown and notified him that he was ready to comply with the terms of sale, and suggested that they do so at once; that said Brown made some excuse, and asked for delay, and said they could fix it next morning; that he saw Brown next morning, who stated then that he had concluded not to comply with the terms of sale, but that, if plaintiff desired to do so, and wanted all the property, he was perfectly satisfied; that he (plaintiff) went at once to said trustees, and notified them of the facts, and of his intention to take the property himself, and of his readiness to comply with the terms of sale, but the trustees refused to permit him so to do; and he charged that said trustees were colluding and combining with the defendant W. G. Brown to cheat and defraud him, and wholly deprive him of the benefit of his purchase, and that they were proposing to re-offer the property for sale, and had given notice that on the 12th of April, 1897, they would again offer said property for sale at public auction, without regard to the rights of plaintiff; that said sale to Brown was fairly made, and for a sufficient price, and was, in effect, a sale to complainant after Brown voluntarily retired therefrom, and notified the trustees that he would not comply; that he had a right to have the sale made to him by said trustees specifically enforced, and he tendered his notes with good security, in accordance with the terms of sale, and prayed that Shaw and Hyde, trustees, be enjoined from selling or offering said brick dwelling house, the lot, or any other property sold as aforesaid to W. G. Brown for complainant, and that said trustees might be required to convey said property to him.

The defendant W. G. Brown answered the plaintiff's bill, and alleged that the allegations in said bill relating directly to the actions, conduct, and alleged understandings and agreements of the respondent with the plaintiff by which they were to buy said property (meaning the brick house and lands and lots contiguous thereto) jointly and that by said contract and agreement respondent was to do the bidding and buy the property in, and the plaintiff to stand by for the purpose of indicating to respondent how much to bid on said property, and that he was to stop bidding when so directed, and under said arrangement

the property was knocked down at four thousand four hundred and seventy-five dollars to them were not true; that he bid for himself only, and the property was knocked down to him at four thousand four hundred and seventy-five dollars; that the sale was made to him alone, and he denied he had any such arrangement before or aftersaid sale, that he and plaintiff were to hold this property jointly, or at any time asked for delay or time to consider the settlement of said joint bid or ownership, or giving joint notes with the plaintiff for said property, as he never had any such arrangement; that while respondent was bidding on said property he was approached by plaintiff, who said to him at the time respondent had a bid of three thousand five hundred dollars on the brick house, which was then being offered separately. "There is no use of us bidding against each other; can't we make some arrangement?" or words of like import, and respondent replied that, if he got the property, then no doubt he and plaintiff could deal; that thereupon, there being no higher bid, said brick house was knocked down to respondent for three thousand five hundred dollars, but only conditionally, as said house was then to be offered with the adjoining lands, and, if they brought more as a whole then respondent was not to have said brick house at his bid of three thousand five hundred dollars, and thereupon, said property being offered as a whole, he bought it for four thousand four hundred and seventy-five dollars. On the following evening plaintiff came to respondent's office, and set up a claim of partnership or joint ownership in said property, which respondent denied, but told plaintiff he might have the property at his bid if he would step in and comply with the terms of sale. Plaintiff replied he would let respondent know the following morning. This was on Wednesday evening, and respondent saw no more of plaintiff until the next Saturday morning, when he came again to the office, and proposed to comply with the terms of said sale. On the preceding Thursday, the plaintiff not having come in as he agreed to do, respondent notified the trustees that he would not comply with the terms of sale, and said trustees again offered said property on Friday of that week, and, not receiving a sufficient bid, adjourned the sale until the following Monday. Said trustees also

answered plaintiff's bill, denying every material allegation with reference to any collusion with said Brown, or knowledge that plaintiff was a purchaser; that, after the sale was made, the plaintiff claimed to said trustees that he was a partner in the purchase with Brown, and offered to comply with his part of the purchase, which the trustees declined, and, when notified by W. G. Brown that he would not complete the purchase, they offered the property again for sale. Said trustees also pleaded and relied on the statute of frauds, and demurred to plaintiff's bill. On the 12th of April, 1897, an injunction was awarded as prayed for in plaintiff's bill. Depositions were taken by both parties. On September 13, 1897, the cause was heard, the injunction perpetuated, and the court further held that the plaintiff was entitled to demand of said trustees, Shaw and Hyde, specific performance of the contract of purchase set out in this bill, and the plaintiff was given ten days from the rising of the court in which to comply with the terms of said sale, and, upon his complying therewith, requiring said trustees to convey to said Ralphsnyder, by deed of special warranty, the property so purchased, and further directing a writ of possession in favor of said Ralphsnyder on his compliance with the terms of sale. From this decree said trustees obtained this appeal, claiming seven points of error. First, as to the action of the court in overruling the defendants' demurrer; second, in dissolving the injunction and dismissing the bill; third, in not excluding certain depositions that were excepted to; fourth, in refusing to hear the cause at the July term, 1897; fifth, in directing a conveyance to plaintiff; the sixth and seventh assignments being the same as the fifth and second.

Do the circumstances shown by the pleadings and proof in this case entitle the plaintiff to the relief prayed for, or to that afforded him by the final decree? His bill alleges that he had an arrangement and understanding with W. G. Brown by which they were to buy the property jointly.—Brown to do the bidding, and plaintiff to stand by and indicate when he should stop. Brown, in his answer, says that while he was bidding on this property he was approached by plaintiff, who said: "There is no use in us

bidding against each other. Can't we make some arrangement?" Now, to what motive can we attribute this language? It is evident there was a desire on the part of the plaintiff to prevent further competition, in order that the property might be purchased for less money than it would have brought had Brown and plaintiff continued to bid against each other; and it would appear from Brown's answer that he was willing, if he could get the property, to deal with the plaintiff. The circumstances immediately attending the sale are detailed by J. P. Neff, a witness examined by the plaintiff. He says: "Mr. J. C. Ralphsnyder asked me to bid on the property for him [the brick house and the surrounding real estate]. He stood by and superintended the bidding upon my part. W. G. Brown and myself bid it up. I bid it up to \$3,400; Ralphsnyder standing by. W. G. Brown bid \$3,500. Then Brown took me to one side, and inquired who I was bidding for. I then told him that I was bidding for J. C. Ralphsnyder, and pointed Mr. Ralphsnyder out to him. I told Mr. Ralphsnyder that Mr. Brown wanted to see him, and they walked off together, and had their conversation to themselves. When they came back, Mr. Ralphsnyder told me not to bid any more until he would let me know, for him and Mr. Brown had arranged the matter to buy the property together, and Mr. Brown would do the bidding. W. G. Brown was present. He did not say anything. He acquiesced in it. I then ceased bidding." On the third day when the property was offered as a whole, this witness says the plaintiff asked him to be present, but not to bid without further orders from him. When the trustee was selling the property, Brown and plaintiff would converse, and then Brown would bid; plaintiff would make gestures to Brown, and then Brown would bid; and the property was knocked off to Brown at four thousand four hundred and seventy-five dollars. The plaintiff also states in his deposition the same in substance as stated by witness Neff in regard to the arrangement between him and Brown to prevent further competition in the way of bidding on said property, which arrangement was made when the brick house was offered separately, and was continued on the next day, when the property was offered as

a whole, and bought in by Brown; that, after this arrangement was made, neither plaintiff nor his agent, Neff, made any other bid. W. G. Brown, in his testimony, speaking of his conversation with Neff during the progress of the sale, says: "During this conversation Mr. Ralphsnyder stepped up to me, and neither he nor Squire Neff informed me that plaintiff was the opposing bidder. Plaintiff then said there was no use bidding against each other, and I told him I did not think there was, and, if I got the property, he and I could deal. * * * My intention was to buy the property as cheap as I could, and sell it to plaintiff at an advance, and in this way make something for myself. After this the plaintiff put no further bid on it. I did all the bidding myself, and it was knocked off to me." Now, then, the pleadings and evidence clearly show that an agreement was entered into between the plaintiff and W. G. Brown, which was not only intended to, but which actually did, prevent competition in bidding upon this property, to the injury and prejudice of those interested in the property on sale, whether as owner or creditors. Will a court of equity enforce an agreement made under such circumstances? On this question, Tucker, in his Commentaries, speaking of frauds upon auctions, says (volume 2, p. 423): "Connected with this subject is the fraud of two persons agreeing not to bid against each other, in order to buy the articles cheap, and share them; which agreement has been decided in New York to be against public policy, and void,"—citing *Doolin v. Ward*, 6 Johns. 194, the syllabus of which case is as follows: "Certain articles being advertised for sale at public auction, which A. and B. were desirous to purchase, it was agreed between them that they would not bid against each other, but that A. should buy the articles, and afterwards divide the same equally with B. A. made the purchase, but refused to deliver B. the one-half of the goods. In an action brought by B. against A. to recover one-half of the profits of the purchase, it was held that the agreement was without consideration, and void, and against public policy."—citing *Hawley v. Cramer*, 4 Cow. 717. In the case of *Underwood v. McVeigh*, 23 Grat. 408, which was a proceeding by way of an attachment against real estate, in which

there was an order of sale, and a sale and conveyance to the purchasers, it was held that: "If the purchaser combined with others to purchase the property at the attachment sale at a sacrifice, and if, in pursuance of such combination, they so acted as to prevent competition at said sale, or to prevent said property realizing a fair value, then such combination and action were fraudulent, and the deed of the sheriff passed no title to the purchaser." The same principle is announced in *Whitaker v. Bond*, 63 N. C. 290, the syllabus in which case reads as follows: "Where a bidder at auction offered one, who also proposed to bid, that, if he would desist, she would divide the land with him, held to be fraud upon the vendor, and so to violate the contract of purchase afterwards made by her as the only bidder." The law is thus stated in 1 Am. & Eng. Enc. Law, 997: "Agreements not to bid at public auction are, in general, void, and against public policy, and tending to fraud, and vitiate the sale; but this rule extends to combinations having for their objects to stifle fair competition with the design of purchasing at a price less than the fair value of the property." Authorities might be multiplied in support of this proposition, but those above quoted clearly indicate that this sale was void, as contrary to public policy. This sale was also void as contrary to the statute of frauds, which was pleaded and relied upon, there being no conveyance or memorandum in writing of the sale and purchase. See *William & Mary College v. Powell*, 12 Grat. 372; *Fleming v. Holt*, 12 W. Va. 143. So far as the evidence shows, there was no note of entry made by the trustees of this sale at the time it was made. See *Smith v. Jones*, 7 Leigh, 165; *Brent v. Green*, 6 Leigh, 16. Looking to the entire record, including the pleadings and the evidence, it is clear to my mind that there was a combination between the plaintiff and the defendant W. G. Brown to prevent competition between them as bidders upon said property, and, as Brown says in his deposition, to buy the property as cheap as he could, and sell it at an advance. It was to effect this object that Brown approached Neff, who was bidding for plaintiff, and to carry out the same intent Neff was ordered by plaintiff to cease bidding. Any combinations of this character, which have

the effect of preventing a fair sale, will prevent a purchaser who makes such an arrangement, and carries it out, from acquiring title as purchaser; and a court of equity will not lend its aid in enforcing a contract of this character against the party with whom the combination is made, but will leave the parties where it finds them. My conclusion therefore is that the circuit court erred in perpetuating said injunction, and in holding that the plaintiff was entitled to a specific performance of his contract against said trustees, Shaw and Hyde. The decree complained of is reversed, and plaintiff's bill dismissed.

Reversed.

CHARLESTON.

FIRST NAT. BANK OF CUMBERLAND *et al.* v. PARSONS *et al.*

Submitted Sept. 15, 1898—Decided Dec. 17, 1898.

1. CIRCUIT COURTS—*Duration of Term.*

A term of a circuit court of one county can, if necessary, prolong its session beyond 4 o'clock P. M. of the third day of the time fixed for a term in another county. (pp. 690-93).

2. CIRCUIT COURTS.

Circuit courts of different counties in the same circuit may sit at the same time. (p. 693).

3. SURETYSHIP—*Release of Surety—Equity—Surrender of Property.*

If a creditor surrender a lien or hold upon property of a principal debtor, which constitutes a substantial security for the debt, in part or whole, without consent of a surety, the surety is, in equity, discharged from the debt, in part or whole, according to the value of the property; but if the principal had really no title to the property, and it cannot be said to have a real value applicable to the debt, and the surety is not injured by the surrender, the surety is not discharged. (p. 695).

45	688
46	124
45	688
49	183
45	688
51	501
45	688
58	8
45	688
164	161

4. SURETYSHIP—*Release of Surety—Debtor and Creditor—Contracts.*

Mere indulgence of a principal debtor by a creditor, without a binding contract for such indulgence, based on valuable consideration, will not discharge a surety. (p. 698).

5. SURETYSHIP—*Continuance—Release of Surety—Contract.*

Mere continuance at a term of court of a suit against a principal debtor by consent of the creditor, not under any valid contract to continue, will not discharge a surety. (p. 698).

6. SURETYSHIP—*Release of Surety—Bill Quia Timet—Contracts.*

The principle on which an agreement for an extension of time discharges a surety is that the creditor thus deprives the surety of means of relieving himself by paying the debt and proceeding immediately against the principal, or, without paying, by filing his bill *quia timet* to make the surety pay, or by notice to the creditor under the statute. The surety is not discharged by an act which in no manner affected his right or impaired the remedies of the creditor. *Adams v. Logan*, 27 Grat. 201. (p. 698).

7. INJUNCTION BOND—*Preferred Creditors—Judgment—Fraudulent Conveyance.*

An injunction bond payable upon the contingency specified in its condition, given before a deed of land which is a preference of one creditor over others, and which stands for the benefit of all creditors, on which bond judgment is recovered after the date of such deed, is entitled, under s. 2, c. 74, Code 1891, to share in said land, the owner of such judgment being a creditor. The contingent character of the bond makes no difference. (p. 700).

Appeals from Circuit Court, Tucker County.

Suits by the First National Bank of Cumberland and others against Ward Parsons and others. From a judgment dismissing the bills, plaintiffs appeal.

Reversed.

W. B. MAXWELL and A. JAY VALENTINE, for appellants.

J. P. SCOTT, A. B. PARSONS, FRED. O'BLUE, and DAYTON & DAYTON, for appellees.

BRANNON, PRESIDENT :

The First National Bank of Cumberland and other creditors of Ward Parsons brought four separate equity suits against him and others, to set aside a conveyance of all real estate to his son Lemuel W. Parsons, as fraudulent; and, upon a joint hearing of the causes, a decree was entered December 14, 1897, dismissing the bills of these

creditors, selling the land for other creditors, but ignoring and disallowing the debts of those creditors, and they appeal.

One error assigned against the decree is that the circuit court of Tucker County was not lawfully sitting on the date of this decree, its term having expired, for the reason that the term of the circuit court of Preston County was fixed by law to begin December 11th, and the Tucker County court could not go on till December 14th. This presents a much-mooted and interesting and very important question, which ought to be definitely decided. It has been the understanding of the legal profession, so far as I am able to say, for many years, that a circuit court term legally ends at a point of time from which there only remains time enough, by the usual course of travel, to enable the judge to reach the next court in the circuit, and open it not later than four o'clock of the afternoon of the third day. This is an impression founded on *Mendum's Case*, 6 Rand. (Va.) 704; *Hill's Case*, 2 Grat. 595, and *Boice's Case*, 1 W. Va. 329. But in all of these cases the sentences alleged to be void because of the alleged expiration of the terms when they were rendered were sustained, because it appeared that a sufficient time remained after sentence for the judge to reach his next court by four o'clock after noon of its third day. In no one of them was the question decided. Is a judgment of a circuit court continuing to sit after it is too late for the judge to so reach and open his next court by four o'clock P. M. of its third day, rendered after that point of time, void, as being *coram non judice*, or voidable for that reason? In *Mendum's Case* the question is mooted, but not decided, but passed by because that sentence was in time for the judge to reach his next term. *Hill's Case* is the nearest approach to the decision of this question. The syllabus of the decision is that "the law has affixed no limit to the terms of the circuit superior courts except that the judge holding the court shall adjourn in time to hold the next court in his circuit at the time appointed by law; and the judge may continue the session of his court until the latest period which will allow him time to get to the next court by four o'clock P. M. of the third day of the term." Judge Duncan does not in his opinion, say just this, but per-

haps it is a fair construction of what he does say. Judge Baker said nothing of that kind. He only said it was the duty of the judge to go on with the prisoner's case after the expiration of his term as he did. But, at any rate, it is not the point of decision, legally speaking, but *obiter dictum*; for Hunter Hill was sentenced at nine o'clock A. M., in Nansemond County, and the court found, as it was certified, that the judge could travel the seventeen miles to the Isle of Wight Court in three hours, thus having four hours to spare. The same may be said of *Boice's Case*; the exact point now up was not decided, the judgment being held to be in time. This understanding has sprung from the generality of Judge Duncan's language in *Hill's Case*, whereas, it is not certain that he or the court intended to decide that a judgment rendered after the third day of the next term was void.

But assume that *Mendum's* and *Hill's Cases* decide that a term can last no longer than a point of time from which the judge can reach his next court by four o'clock P. M. of its third day, and that a judgment rendered later than that point would be void; I would then hold that these cases do not govern, because the statute existing then is different from that now in force. The statute governing those cases reads: "Each of the aforesaid courts shall sit until the business thereof shall be dispatched, unless the judge holding the same be compelled to leave the court, in order to arrive in time at the next succeeding court of his circuit, or at the general court." I Rev. Code, p. 229. Here, it might be said, was a limitation to the term by the letter of the statute. In *Mendum's Case*, Judge Bouldin states that two of the judges—Brockenbrough and Summers—were "strongly inclined to think that the qualifying words unless the judge be compelled to leave in order to arrive, etc., are to be considered as directory or permissive only, and that of the necessity to go to the next court, or to finish what is before him, and what has already been begun, he is to judge, and, on his own responsibility, decide whether a compliance with the express orders of the legislature to dispatch the business before him, or go to the next court, as the law permits, will best subserve the public interest. They argue that

it is right it should be so, else there would often be a failure of justice. In some of our courts it sometimes happens that cases of the most important character could not be finished, and consequently, would never be tried, unless the judge has power to run into the term of the next court to which his duty calls him; and, as the legislature has fixed no precise limit, the construction which best fulfils their general purpose is the right one." But this point was waived, not decided.

Our present statute (section 2, chapter 114, of the Code) reads: "The supreme court of appeals and circuit court may at any time adjourn from day to day until the business is dispatched, or until the end of its term,"—meaning to authorize adjournment from day to day, and to continue these adjournments until the business is done, or until it actually adjourns; the end of the term here meant being not that which happens from the coming on of the time fixed for another court, but the actual end of the term by actual adjournment. This section leaves out that language in it when *Hill's Case* was decided, "unless the judge holding the same shall be compelled to leave the court in order to arrive in time at the next succeeding court of his circuit." The statute having changed, *Hill's Case*, if it decided the point, cannot apply. We must construe and apply our present act. Our statute law fixes dates for the commencement of terms, but fixes no express length of those terms. The only limitation is one to be implied, it may be said, by the coming of the time fixed for another court; and, as each county has its time, the law intends to close one court when another begins. But it is only an implied termination. The judge is directed, it is true, to hold a court in the other county; but, if he continues in one county, the court of the other county is simply without a term,—the term is simply lost in the second county. The Preston term is simply lost or lapsed; but the Tucker term, already in session, if actually continuing, is still the circuit court of Tucker. It has not ceased to exist. It has its own separate, independent, existence as the circuit court of Tucker. The regular judge of the circuit—the person representing the judicial office and function in the circuit—is on its bench, and nowhere else; and it cannot be that its acts are void. The plain ob-

ject of the act is to continue the court until the business is done; but, as that might prolong its session indefinitely if it had to sit until all its business was dispatched, the act plainly contemplates the power to adjourn, though all the business may not be done, by the use of the words, "until the end of the term." Look at the inconvenience and evil resulting from a different construction. An important criminal cause, occupying days or weeks in one county, is on trial. All the evidence and arguments have been heard. The jury is out deliberating, but has not reached a verdict. The clock strikes the hour when the judge ought to leave to get to his next court. He calls in the jury, and disbands it; remands the prisoner to jail. All the expense and work go for naught, and, worse yet, the prisoner is deprived of his right of a speedy trial. I cannot yield to this construction, entailing so much evil, without a statute more plainly calling for it than our present statute. Therefore I think the acts of the circuit court of Tucker not void, though done by that court sitting any number of days into the term fixed for the circuit court of Preston. It seems to me that common sense, convenience, dispatch of the public business, range themselves on the side of one construction; mere idle technicality and inconvenience on the other. Two courts in the same circuit can proceed at the same time in different counties. The law provides that a judge of one circuit may hold in that of another. The circuit court of each county is a separate, distinct entity,—an existence in itself. Why a lawful judge may not sit in one county, another lawful judge in another county of the same circuit at the same time, I have yet seen no good reason. It does not appear whether the circuit court of Preston was going on at the time or not. If so, it would not, in my judgment, alter the case.

Under authority of the Constitution (Art. VIII., Sec. 15) the legislature, by Code 1891, c. 112, s. 11, has provided for holding circuit courts "when from any cause the judge shall fail to attend and hold the same, either at the commencement of the term, whether regular, adjourned or special; or if he be in attendance, and cannot properly preside," by the election of special judges. The special judge is a judge, under the Constitution and statute, vested with circuit court

powers, and just as much authorized to hold a circuit court as the regular judge,—considerations which, it seems to me, carry the conclusion that two courts in the same circuit can go on, under lawful judges, at the same time. The language of Constitution and statute is broad,—“When from any cause the judge shall fail to attend;” the evident purpose being to save the term when the regular judge does not come. Each court has a separate existence. It is created for the county. So it have a judge, it is a lawful court; and that it may have, the law has provided. What has the circuit court of Tucker to do with the circuit court of Preston, or the reverse? Why can they not both act at the same time? Public need and policy both say they can. I have no doubt of it.

I come now to the merits of the case. The case was once before in this Court, and the nature of it will be found in 42 W. Va. 137, (24 S. E. 554). Certain creditors of C. H. Barritt, Jr., had instituted chancery suits against him to recover debts, and levied attachments upon his personalty and land as his property; and there was a decree in the suits heard together, subjecting the personalty to sale, and decreeing the debts personally against Barritt, but no decree against the land, and referring the cases to a commissioner, to report the lands owned by Barritt, levied under the attachments, the condition and state of the title thereto, their owners and priorities. A few days later, bonds were given by Barritt, in which Ward Parsons was a surety, to release the personalty levied under the attachments of certain of the creditors. A few days later came a decree reciting that these bonds had been given, and the attachments released by the sheriff. In this decree occurs this clause, after declaring that the sheriff had released the attachments: “Thereupon, on motion of the said defendants, the decree entered in these causes at this term, directing a sale of the property which has been attached, is set aside, and, by consent of parties, no decree is to be entered in these causes in favor of the plaintiff at this term.” Of course, the sheriff could not release attachments on realty, or the lien thereof. He possessed no power to do so. He could release the personalty only. It is said that the former opinion in this case decided that,

by the clause above quoted from the decree, the plaintiffs, by their consent, released the personal decree against Barritt, and thereby released the lien of that personal decree on his land, and thus absolved and discharged Ward Parsons, the surety in said replevin bonds, from all liability arising from them. I do not see how it can be said that said clause in said decree shows that the plaintiffs in those causes consented to the setting aside of the decree, when its terms show that it was the action of the court. The former decision was one of reversal, not affirmance, and question might be made of the effect of such opinion now, if it were material; but it is not. And question might be made, looking at other passages in the opinion, whether it was intended to finally pass upon the question, and hold that the clause showed that the plaintiffs consented to the setting aside of the decree. But it is useless to discuss that further. That opinion clearly left open for future ascertainment and decision whether that personal decree operated on any land, whether the land was of any value, whether it would have discharged the debts *pro tanto* or *in toto*.

Suppose, however, we say that the action of the plaintiffs in that decree is such as constitutes a surrender of a lien, if there was one, or to give further indulgence to the principal debtor, W. A. Barritt, Jr.; that will not discharge the surety, Ward Parsons, for we must then see whether it entailed injury on Parsons. If Barritt had no land to which the personal decree could attach, or if, though vested with a title, it was colorable only,—a mere shadow, constituting no substantial estate from which payment could be reasonably expected,—the surrender of this decree would not discharge Parsons. The question is: Did the surety really thus suffer a loss? 24 Am. & Eng. Enc. Law, 851, says: "A surety is released when the creditor parts with a lien for the payments of the principal's debt. The release or surrender of the lien or security will not, however, discharge the surety absolutely from all liability, but only to the extent of the loss which his action will cause the creditor." It will release *pro tanto* or *in toto*, according as the value of the property released was equal to or less than the property released. *Bunk v. Parsons*, 42 W. Va. 138, (24 S. E. 554, Syl. point 8); *McKenzie v.*

Wiley, 27 W. Va. 661; *Mingus v. Daugherty* (Iowa), 54 N. W. 66.

Without detailing evidence, I can say that, when this decree was set aside, the two tracts of land to which Barrett had a paper title, and no possession, were not owned by him. His title was an empty shell. They were omitted from the tax books for many years, and were thus forfeited, and the legal title vested in the State, or in junior or other claimants. There was a right of redemption, it is true; but it is not possible to say the creditors had to institute proceedings, and pay out money to redeem. How much money? Likely more than their debts. And it would then avail nothing; for all this land was claimed under adverse titles, and their claimants in actual adverse possession for many years, and redemption would not take from them the forfeited title vested in them; and, if it could, they would hold all or great part by adversary possession, and perhaps by superiority of title. The creditor, the books say, need not use ordinary diligence, unless urged thereto by the surety. They could not sue the State to allow redemption of the land, because, the law provides for no such suit. Were they to wait, before proceeding on the replevin bond, till the State asked a sale of the forfeited land, and then redeem by petition? That would be a high degree of diligence, attended by large outlay and delay, which the law did not require of them. Further, these two tracts, before the so-called "release," were levied upon by attachment in a suit of the Bank of the Ohio Valley against Barritt, before attachments in which the bonds were given, in which Parsons was Barritt's surety, and were sold under decree in that suit, the tract of three thousand nine hundred and fifty-three acres realizing one thousand dollars, and that of three thousand four hundred and seventy-seven acres one hundred dollars, leaving three-fourths or more of the bank's debt unpaid; and the tract that brought one thousand dollars was bought in by it, else it would likely not have brought what it did. This shows alone that the personal decree against Barritt was not worth any sum which we could reasonably name. A redemption by those creditors would have been only for another creditor. The commissioner reported without details that the title to the tracts was "considerably clouded, the same over-

lapping several other tracts." He failed to answer the requirement of the decree that he report on the condition of the title any further. He reported their value upward of twenty-four thousand dollars, but that was on the basis of clear title. The evidence taken by him showed clouded, dangerous title; one witness, County Surveyor J. W. Bowman, saying: "I am under the impression there isn't an acre of this land but what is owned by other parties" than Barritt. And consider, too, that attachments levied in these creditors' cases on this land were not released. They were liens older than the personal decree. Parsons could be substituted to their lien on paying the debts, but they were worthless from the simple fact that Barritt's title was what is called in West Virginia vernacular, "wild-cat title,"—a mere illusory will-o'-the-wisp. *Blydenburg v. Bingham*, 38 N. Y. 371, held that where a creditor releases from his judgment land in which it was thought such debtor might have some contingent interest for the purpose of relieving the premises from a possible cloud, it does not discharge the surety, where it is shown that in fact the debtor had no title whatever in the land released, and that, in consequence, the judgment never was a lien upon it. "Surety not released by any act or conduct of payee which does not place surety in a worse position." *Driskell v. Mateer*, (Mo.) 80 Am. Dec. 105. The burden is on the surety who has voluntarily assumed obligation, and asks that an honest debt shall be lost to its owner, to show that the creditor surrendered something that would have availed to save him from loss. *Knight v. Carter*, 22 W. Va. 422 (Syl. point 6). But, if the burden were on the other side, enough is shown to show that no lien was released.

Having discussed the case as respects the setting aside of the personal decree, I next advert to the question, does the consent of the creditors not to ask a decree in the cases at that term of the court release the surety, Parsons? This was, clearly, not decided in our former decision. This comes under the head of indulgence to the principal. It is hardly indulgence. It fixed no new day of payment, and this is necessary to release surety. *Alcock v. Hill*, 4 Leigh 622; *Brandt*, Sur. s. 344. It is not the case of a new contract or novation of the debt, so as to discharge the surety

absolutely; but, if it discharges, it must be because it is mere indefinite indulgence. No consideration for this indulgence appears, and therefore, unless the fact that it is a consent of record changes it, the want of consideration prevents it from operating to tie the hands of the creditor, and therefore does not release the surety. Mere leniency, mere indulgence, extended often and often by creditor to debtor, does not discharge a surety. *Knight v. Charter*, 22 W. Va. 429; *Norris v. Crummev*, 2 Rand. 334; *Alcock v. Hill*, 4 Leigh 622; 3 Minor. Inst. 187. The most we can say is that such consent of record estopped the creditors from asking a decree that term of court. I do not know that it did that, as the parties might withdraw their consent with the court's leave; and the court seeing that it was based on no consideration, if the other party were present, or on rule, would set it aside, on motion of creditor or surety, if justice required. It was a mere consent not to prosecute that term, and not releasing the attachments or changing the status of the cases for future efficacy. It was only a continuance. JUDGE WOODS says, in *Knight v. Charter*, *supra*: "The creditor may sue or not sue. If he sues, he may, if he pleases, dismiss or discontinue it. If he prosecute to judgment, he may or may not sue out execution." The cases support this statement. The syllabus says: "Sureties are not entitled to be absolved by want of diligence on the part of the creditor in prosecuting his demand against the principal." The surety "is not discharged by creditor's discontinuing proceedings against principal, where there was no abandonment of any absolute lien or security." *Springer v. Toothaker*, 69 Am. Dec. 66.

Here, too, comes another consideration. If that consent continuance did bind the creditors to a continuance, it did not tie the hands of the surety from any legal steps he might take for his security; and the cases all say that, if what the creditor does does not stop the surety from steps to save himself, he is not released, In *Norris v. Crumley*, 2 Rand. 329, JUDGE GREEN said that if the creditor's agreement still left the surety free to proceed against the principal, or pay and be substituted to liens, and there were left the attachments, or the surety might proceed himself

by bill *quia timet* against creditor and principal, "no injury is done to the surety by the creditor, and there is no possible reason for absolving him." The same is stated by Judge Moncure in *Shannon v. McMullin*, 25 Grat. 212, and in *Adams v. Logan*, 27 Grat. 201. It cannot be said that the steps of the surety—anything he might do to protect himself—were hindered by this continuance.

Under this head is another consideration; What good would a decree at that term of court have done the surety? I have shown that a personal decree as to the land would have been unavailing. So would a decree for its sale under the attachments, though they were left standing for future action. And Barritt was insolvent, except as to the personalty attached; and that was sold under attachments heard with those cases, in which no replevy bonds were given, and it was levied on, and Parsons, by going into the bonds, released it. How did the continuance prejudice him? Many authorities hold, even where there is a binding agreement to extend time, that thereby the surety must be actually prejudiced, to be relieved. "It must put him in worse position." *Driskell v. Mateer* (Mo.) 80 Am. Dec. 105; *Brown v. Wright*, 18 Am. Dec. 190; *Steele v. Boyd*, 29 Am. Dec. 226; *Fulton v. Matthews*, 15 Johns. 433, (8 Am. Dec. 261), where the court says: "A delay to sue, or even a discontinuance of a suit brought, cannot absolve the surety if he is passive and takes no measures indicating to the holder of the note that he insists on his proceeding against the principal. It ought to be put beyond a doubt that the surety is injured by the delay; that is, that the principal was solvent, and able to pay the debt, if he had been prosecuted for it." "Nothing from nothing, and nothing remains." It is apropos to this last eminent authority to say that no decree, personal or against the land, would yield any return, and the continuance did not make worse Parson's condition; and to remark, further, that he was passive, and was somewhat a party to the cases, by signing the bond to redeem the personalty from the attachment which laid him under obligation to see that there was a decree, if he wished one for his safety. His ownact practically gave indulgence, and now he complains of creditors.

After the best consideration I am able to give this case,

I conclude that it is against equity to take from these creditors, their just debts, and release a party who stayed their hands in securing their money, and freely assumed the burden. Before doing so, we ought to see some substantial wrong, actually prejudicing Parsons, done by these creditors. The grounds on which he asks release are too unsubstantial.

L. W. James joins in this appeal because the decree disallowed his debt reported by the commissioner as a debt against Parsons. Our former decision held that the land conveyed by Ward Parsons to his son Lemuel W. Parsons should answer all debts at the date of the conveyance against Ward Parsons. This James debt was excluded, on the erroneous opinion that it was nonexistent as a debt of March 4, 1892, the date of the deed from Ward to Lemuel W. Parsons. This James debt was based on an injunction bond dated March 31, 1891, thus antedating the deed. Judgment on it was rendered against Ward Parsons March 15, 1894, after the deed. The date of the judgment is immaterial, as the obligation of the bond began with its date. The fact that it was not, like a straight note, for the unconditional payment of a fixed sum, makes no difference, as it was an obligation to pay money in a certain contingency,—the dissolution of an injunction,—and James, claiming under it, is a creditor, under Code 1891, c. 74, ss. 1, 2 (both sections). Whether the conveyance be fraudulent in fact, or merely voluntary, or one under section 2 held neither fraudulent nor voluntary, but a preference, and therefore standing for all then-existing debts or liabilities such an obligation comes in, though the liability be contingent. *Wolf v. McGugin*, 37 W. Va. 564, (16 S. E. 797); 5 Am. & Eng. Enc. Law (1st Ed.) 179; Bump. Fraud. Conv. ss. 502, 503; *Hutchinson v. Kelly*, 1 Rob. (Va.) 123; *Scraggs v. Hill*, 43 W. Va. 172, (27 S. E. 310). James' debt was improperly rejected. So as to the debts of First National Bank of Cumberland, Daniel Miller & Co., Greer & Laing, and L. D. Rohrer. Those debts must be allowed their proper participation, after preferred debts, in the property to be sold under a future decree. Reversed and remanded.

Reversed.

CHARLESTON.

GRAHAM v. CITIZENS' NAT. BANK OF PARKERSBURG.

Submitted Sep t. 17, 1898—Decided Dec. 17, 1898.

45	701
50	530
45	701
56	190
45	701
58	20
58	240

1. EQUITY—*Injunction—Judgment—New Trial.*

Chancery will not enjoin a judgment at law and grant a new trial merely for error in the law court, but only because of fraud, accident, surprise, or some adventitious circumstance unknown to the party before judgment, and beyond his control. (p. 703).

2. EQUITY—*New Trial—Judgment—Appellate Court.*

If a party know, or by ordinary diligence could have known, before a final judgment in a law court, a fact, he must make it the ground of a motion for new trial, and, if refused, go to an appellate court, as equity will not grant him a new trial for it. (p. 706).

3. EQUITY—*New Trial—Change of Venue—Writ of Error.*

Equity will not grant a new trial because of prejudice in the community. That must be made available by application for a change of venue and writ of error. (p. 705).

4. EQUITY—*New Trial.*

A new trial in equity cannot be had on merely asking. Particular grounds pointed out by equity law must exist, and they must be clearly proven. (p. 705).

5. VERDICT—*Jurors.*

Jurors will not be heard to impeach their verdict, except in few instances. They are heard more readily to sustain their verdict. (p. 703).

6. DEPOSITIONS—*Jury—Leave of Court.*

Depositions read in a trial at law by a jury cannot be carried out by the jury, to be considered when deliberating on the case, except by leave of court. Code c. 131, s. 12 (p. 704).

7. JUDGMENT—*Injunction—Jurisdiction—Judge.*

In case the judge of a circuit is interested, a circuit court of a

county of an adjoining circuit has jurisdiction to enjoin a judgment rendered in a court of his circuit. (p. 707).

8. *EQUITY—New Trial—Injunction—Judgment.*

Chancery cannot reverse or set aside a judgment of a law court for error or other cause, and order the law court to grant a new trial, but it can act on the person of the owner of the judgment by injunction against the enforcement of the judgment, and direct a trial by jury, and, upon verdict, either perpetuate or dissolve, in whole or in part, the injunction. (p. 708).

9. *JUDGMENT—Injunction—Injunction Bond—Costs.*

Where there is an injunction to a judgment against two or more persons, and only one signs the injunction bond or applies for the injunction, upon dissolution there should not be award of execution for damages at ten per cent. on principal, interest, and costs from the date till dissolution of the injunction against all the judgment debtors, but only against those signing the bond or asking the injunction; nor should costs in the injunction case be given against those not going in bond or injunction. (p. 708).

10. *HARMLESS ERROR—Costs.*

Where there is no other error, this Court will not reverse for error as to costs. (p. 708).

Appeal from Circuit Court, Jackson County.

Bill by R. B. Graham against the Citizens' National Bank of Parkersburg. From a decree dismissing the bill plaintiff appeals.

Affirmed.

WILLIAM A. PARSONS and V. S. ARMSTRONG, for appellant.
V. B. ARCHER and WILLIAM BEARD, for appellees.

BRANNON, PRESIDENT:

The Citizens' National Bank of Parkersburg brought two actions at law in the circuit court of Wirt County,—one against R. B. Graham and D. H. Bumgarner, and the other against R. B. Graham and M. M. Dent,—which were tried by jury, and in which the verdicts were for the bank, and judgments given for it. Graham then brought a chancery suit in Jackson County to obtain a new trial, and, it resulting in a dismissal of his bill, Graham appealed to this Court.

The printed record is three hundred and eighty-five pages, and the briefs copious; yet I think the matter to be considered, very limited, and dependent on well-settled

principles. The bill of twenty printed pages sets up very many matters as grounds for new trial, and impeaches the court and jury which tried the cases, and the community where the cases were tried, for prejudice against Graham, all of which substantially fail for want of proof; most of them immaterial, even if true. After a trial at law, application to equity for a new trial stands on very restricted ground. Courts of equity have no disposition to prolong litigation after fair trial at law. It will do so only where the reason for it is based on fraud, accident, surprise, or some adventitious circumstance beyond control of the party. *Braden v. Reitzenberger*, 18 W. Va. 286; *Sayre's Adm'r v. Harpold*, 33 W. Va. 557, (11 S. E. 16).

From the many grounds presented by the bill for new trial, all are eliminated, and very properly so, by the last brief of appellant's counsel, but three, viz: (1) That the depositions of Shattuck, Jackson and Flaherty in some way got before the jury in its retirement to consider of its verdict, and were read by the jury; (2) that public prejudice existed in the town of Elizabeth and in Wirt County against Graham at the time of the trial; (3) personal ill-will and prejudice on the part of some jurors.

As to the depositions: This charge is sustained by the evidence of two jurors. A long list of Virginia and West Virginia cases, as well as late cases from almost everywhere, hold that the evidence of jurors will not be heard to impeach their verdict. *State v. Cobbs*, 40 W. Va. 724, (22 S. E. 310); *Probst v. Braeunlich*, 24 W. Va. 357; *Steptoe v. Flood's Adm'r*, 31 Grat. 323; *Reydolds v. Tompkins*, 23 W. Va. 229; 4 Minor, Inst. pt. 1, p. 761; 2 Thomp. Trials, s. 2618. But the effort is to make this case an exception to the confessed general rule, upon the argument that while the evidence of jurors is inadmissible as to their motives in reaching a verdict, or the consideration they gave the evidence of persons or papers, or whether they considered irrelevant or improper evidence, yet they are competent to show collateral or independant circumstances, or facts which, by mistake, accident, or fraud, were before the jury. I do not think this exception can be sustained. Look at the reason of the rule. It is based on a general policy. In *Bank v. Waddill's Adm'r*, 31 Grat. 483, Judge

Moncure says that the rule rests on three grounds: (1) Because the evidence would tend to defeat the solemn acts of the jurors; (2) their admission would open the door to tamper with jurymen after they have given their verdict; (3) because such evidence would be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had assented to it. These reasons apply to this case. While the evidence of jurors cannot impeach their verdict, it is sometimes received to support it, though cautiously. *State v. Cartwright*, 20 W. Va. 32, (Syl. point 5.) One juror says the depositions were not before the jury. He was foreman, and would likely know. Another, who, as Graham said, told him they were before the jury, when put under oath, says that he does not recollect that they were. If they were, it is strange he had forgotten it. The only evidence we have to show that the depositions were before the jury is that of Graham, whose evidence throughout shows a deep feeling, a strong prejudice, and very ready and liberal unrestrained statement in his own behalf, on this and other points. How does he know the depositions were before the jury? My construction of his evidence is that he saw a bundle of numerous papers, which were before the jury by consent and leave of court, returned into court when the jury returned their verdict, which were all wrapped up in a newspaper, and that at a subsequent time, after the court had adjourned, when he looked among those papers to secure some of his, he for the first time observed these depositions among them, and thence concluded they had been before the jury. On this he flatly states that they "were read by the jury," as if he had been in the jury room. Now, these depositions might have been put among the papers in the meantime. We do not know. We want certainly to nullify a tedious trial. This interested witness is not alone adequate to establish this important fact. Why did he not prove this by the clerk who would likely know? Is it his effort to defeat verdicts rendered in due course for just debts? If he did see these depositions for the first time after adjournment, it does not show that they were before the jury. If he saw them just when the jury returned, that utterly defeats his bill as to this ground of new trial, because the law com-

pelled him to make a motion then and there for a new trial, and state this fact as its ground. He did not. The law is that an application to equity for a new trial cannot be had on merely asking. He must prove good ground. *Black v. Smith*, 13 W. Va. 780. And the ground must be one which was unknown to the party before adjournment of court. *Alford v. Moore's Adm'r*, 15 W. Va. 597; *Meem v. Rucker*, 10 Grat. 506; *Faulkner's Adm'r v. Harwood*, 6 Rand. 126. I do not assert that, if these depositions were read by the jury, it would not be ground for new trial. I shall not discuss this, because their presence before the jury is not established; but in this connection it may not be without force, in denying the bill, to say that, if they were, it ought not to affect the case, but is a mere technical objection, to frustrate a fair trial, because they were taken before a commissioner, to whom the case was referred to take an account, and all parties agreed that they might be read in evidence, though they were not read on the trial; and to say, further, that the witnesses who gave them were examined on the trial, and it ought to appear that the depositions were different from their evidence. Did they hurt Graham more than the evidence of the witnesses? Did they contradict them? It does not appear. And how do we know the court did not, as it could, give leave to let them be carried out by the jury? This deposition matter is the core of the plaintiff's case, and there is nothing in that.

As to the second point,—prejudice in the community: If the case were a criminal case, we might more readily credit the existence of this prejudice; but it is hardly credible that a prejudice existed about actions of debt on two small promissory notes, sufficient to prevent justice in judge and jury. This is not a fact discovered after trial, and not one which ordinary diligence could not have revealed. Graham had lived at Elizabeth thirteen years, was mayor, and well acquainted with the people. If this "torrent of prejudice," so called by a witness, existed, he surely knew it. The cases had been pending five years. Strange that the roar of the torrent was not heard till the trial, and not then till after verdict! Graham ought to have asked a change of venue to get away from this prejudice; but

he took his chances, and lost, and on this ground wants to defeat a fair trial. Surely, too, as the trial lasted four days, the prejudice would crop out before the verdict. Why did not Graham make it a ground of new trial? "To sustain application to equity for a new trial, it should appear, not only that complainant could not lay his case before a jury, but why he did not move to set aside the verdict; and, though the province of a court of equity to inquire into alleged mistrial still exists, it has been circumscribed, and will not be exercised, unless it appears, not only that the verdict was erroneous, but that the plaintiff could not have had the mistake rectified by the use of proper diligence." Bart. Ch. Prac. 42; *Braden Case*, 18 W. Va. 286, (Syl. points 1, 3). But the truth is no such prejudice is shown as would at all affect the verdict. When asked whether he could not have made inquiry to find out prejudice and other things of which he complained, Graham answered, "No, sir; was too busy preparing my case and attending to my family." If this prejudice existed, was he willingly blind to it?

Third. As to prejudice of some jurors: This is one of the numerous charges of the bill selected by counsel as one of three relied upon, and there is no evidence to sustain it. The defense had right to peremptory challenge of jurors, and right to test them as to prejudice and partiality. There is no specification under this head,—no proof, no argument, because there is no proof.

Though not under the three heads of relief specified by counsel in their brief, complaint was made that the case was not continued for the absence of witness Bumgarner. It is only necessary to say that this was a subject for exception and writ of error.

The brief specifies also that certain pass books, bank books, notes, and checks, produced by Graham, and used by the attorneys at the bar, were locked up by order of the judge from Friday till Wednesday, during an adjournment, and the clerk refused access to them to Graham during that adjournment. Now, this is a general charge. Graham knew these papers well. But, surely, the judge would have given him time to examine them on reassembling, if asked. It is not shown that he asked indulgence. If any

harm was done in this, it was proper for a motion for a new trial and exception and writ of error.

I have written too much for the case; for really, on the merits, to speak mildly, it is barren of strength for relief. The whole face of the case shows it to be merely an effort, on no solid basis, to get rid of a fair trial and verdict.

It is cross assigned as error by appellee that the circuit court of Jackson had no jurisdiction. As appellee gained the case, it does not prejudice it; but the question is raised. The judge of the circuit in which Wirt County is included was interested in the case, and under Code, c. 123, s. 1, cl. 7, the suit was brought in Jackson County. It is argued that while chapter 123 points out, in general, in what particular county a suit is to be brought, yet chapter 133, section 4, is a special enactment, and it limits an injunction suit to the county in which the judgment, act, or proceeding shall be, and, as this is an injunction, the suit must be in Wirt. If so, a case might be long tied up, awaiting decision, because of the incompetency of the judge to act in the case. True, our present provisions for special judges relieve such cases; but we must discard that consideration, as these enactments existed before those provisions. If that argument is tenable, then nothing but the coming of a judge of another circuit by exchange would relieve the case. Clause 7 says that "if a judge be interested in a case which, but for his interest, would be proper for the jurisdiction of his court, the action or suit may be brought in any county of an adjoining circuit." In its well-chosen words and its known purpose, this clause imports that it controls, by its generality, the particularity of all other clauses of chapter 123, and also section 4, chapter 133, as to injunctions. It says: "You may sue in an adjoining circuit in any case which, but for such interest, would be proper for the jurisdiction of his court." It is an exception to other general provisions. True, a judge of any circuit may award an injunction, but cannot hear it; for, after the award, the injunction must be heard in the county assigned to it by law. I think that said injunction provision relates to pure bills of injunction, not to cases where other causes of action and relief would give jurisdiction in another county, the injunction being then merely ancillary.

It is not certain how we should classify this suit. It seeks a new trial, and, until that can be had, an injunction to the enforcement of the judgments. It may be said that, as the object is a new trial, it is not a pure bill of injunction, and therefore the injunction section does not control the jurisdiction; but as the object of a bill in equity for a new trial, so called, is not purely for a new trial,—that is, as it does not give a retrial in the law court, but only directs an issue in the chancery suit as a step to inform the chancellor whether he should perpetuate or dissolve the injunction.—I regard the injunction the main relief, and I hold the case to be one of pure injunction. Equity does not grant a new trial in the law forum. It only gets control of the person by injunction, tries the merits by a jury, and then dissolves or perpetuates the injunction, that being the process by which it executes its function. *Railroad Co. v. Davisson*, 45 W. Va. 12, (29 S. E. 1028).

It is assigned as error that, on dissolution of the injunction, the court, under section 12, chapter 133, Code 1891, combined principal, interest, and costs of the judgments up to the date when the injunction took effect, and gave damages on the total at ten per cent. per annum from that date to the date of dissolution of the injunction against Graham and Dent, whereas, Dent did not sign the injunction bond. I think it is wrong to give that total award of execution against Dent. It should have been against Graham alone. Thus Graham would be liable upon the injunction bond, and both on the original judgment. But the effect of this is to give four per cent. for only about nineteen months against Dent,—much less than one hundred dollars,—and therefore we cannot reverse the case for that. *Lamb v. Cecil*, 25 W. Va. 288.

The court erroneously awarded half the costs of the bank in defending this suit against both Graham and Dent. Dent was a party, it is true, but he did not sue out the injunction, or sign its bond, or seek to sustain the injunction by any pleading; and the award of costs against him I regard as wrong. One debtor cannot thus impose costs on another. But we have settled it that we will not reverse a decree where there is no other error than in the matter of costs *Long v. Perine*, 41 W. Va. 314, (23 S. E. 611); but

we will correct the decree so as to protect Dent against this erroneous imposition of costs. We must affirm the decree.

Affirmed.

CHARLESTON.

HARR v. SHAFFER *et al.*

Submitted Sept. 15, 1898—Decided Dec. 17, 1898.

1. TITLE—*Cloud on Title—Bill in Equity.*

A party who files a bill to remove a cloud from his title to a tract of land, who shows on the face of his bill that he has no title to the land himself, and no right to interfere with others who appear to have good title thereto, is not entitled to be heard in a court of equity, and his bill will be dismissed. (p. 714).

2 DISCOVERY—*Equity—Equitable Relief.*

Where a party seeks to be heard in a court of equity on the ground that he is entitled to a discovery, and his bill and exhibits show that he already has information he pretends to seek by his prayer for discovery, such prayer will not entitle him to relief in equity. (p. 714).

Appeal from Circuit Court, Tucker County.

Bill by Seymour Z. Harr against Samuel J. Shaffer and others. From a decree dismissing the bill, plaintiff appeals.

Affirmed.

L. HANSFORD, DAYTON & DAYTON, and FRED O. BLUE, for appellant.

C. WOOD DAILEY, J. P. SCOTT, and A. B. PARSONS, for appellees.

45	709
58	378
45	709
60	688

45	709
65	123

ENGLISH, JUDGE:

This was a suit in equity instituted in the circuit court of Tucker County by Seymour Z. Harr against Samuel J. Shaffer, A. B. Parsons, Joseph Harper, P. T. Shearer, James S. Whiting, John T. Vanmeter, Gottlieb Hutter, C. W. Dailey, trustee, and others. The controversy seems to have arisen from the fact that the plaintiff, Harr, claims to be entitled to a certain tract of land of three hundred twelve and one-half acres, which on October 2, 1889, was conveyed to him by Samuel H. Shaffer and wife. This tract of land appears in the record to have been variously described, sometimes as containing two hundred and ninety-eight acres, again three hundred twelve and one-half, and again three hundred and twenty, and to this some of the confusion in the cause may possibly be attributed. Did the plaintiff acquire any title to said land under the deed from S. H. Shaffer and wife?

It appears from the record that this tract and several others in Tucker County belonged at one time to one Adam C. Harness, and that on the 19th of August, 1882, said Harness conveyed said tract, describing it as three hundred and twenty acres, to William M. Randolph, trustee, to secure to one Joseph Harper the sum of four hundred dollars, evidenced by a note payable one year after date. At the October rules, 1883, Lorenzo S. Anvil brought a suit in equity against Adam C. Harness and others to subject the real estate of said Harness to the satisfaction of certain judgments and liens thereon, but said Harper was not made a party thereto, neither were his sureties. A copy of the record of the proceedings in said suit is exhibited in his cause, from which it appears that the cause was referred to a commissisner who was directed to report the real estate owned by defendant A. C. Harness, the state and condition of the title thereto, and the annual rental value thereof, the liens thereon, their character, amounts, and priorities, and to whom owing. Among the liens reported was a trust lien against the two hundred and ninety-eight acre tract, balance of the four hundred acre tract, due to Joseph Harper for principal and interest, four hundred and forty-one dollars and sixty cents.

(This two hundred and ninety-eight acre tract seems to be the same elsewhere described as three hundred twelve and one-half acres.) Such further proceedings were had in said cause that a decree was rendered therein directing the sale of certain lands reported as owned by said A. C. Harness, and, the commissioner appointed to make said sale having reported his sale, the same was confirmed, and he was directed to collect the proceeds and disburse same according to the priorities ascertained by said commissioner and fixed by a former decree, except the deed of trust lien of four hundred forty-one dollars and sixty cents due said Joseph Harper, which was a specific lien on the two hundred and ninety-eight acre tract mentioned in said commissioner's report, which was directed not to be paid out of the proceeds of said sale; and it was directed that said Harper was not to be prejudiced or prevented by said decree from enforcing his said trust lien against said land by any proper proceedings instituted by him for that purpose. It further appears that at the sale of said lands made by special commissioner said Harness became the purchaser, and the defendant Shaffer became his surety; that, Harness failing to comply with the terms of sale, the commissioner obtained a decree to resell them for the purchase money, and the land was again offered, and said Shaffer became the purchaser; and by reference to the deed from A. B. Parsons, special commissioner, to Shaffer, it will be seen that the two hundred and ninety-eight acre tract,—described in the commissioner's report as four hundred acres, less one hundred and two acres sold to Leatherman,—was not conveyed to Shaffer, and it should not have been, for the reason that the decree confirming his report of sale to Harness expressly provided that said Harper was not to be prejudiced or prevented from enforcing his trust lien against said two hundred and ninety-eight acre tract, and when Harness failed to comply, and Shaffer became the purchaser, he took the land that Harness had formerly purchased, and in no manner prejudiced or interfered with the lien of Harper upon said two hundred and ninety-eight acres, and Commissioner Parsons recognized this fact by not conveying the tract to him. On the 6th of March, 1891, it appears that William M.

Randolph, the trustee named in the deed of trust, executed by Adam C. Harness on said three hundred twelve and one-half acre tract, which is described as two hundred and ninety-eight acres, to secure Joseph Harper his note of four hundred dollars, ceased to act. C. W. Dailey was appointed trustee in his room and stead by the circuit court of said county, and, having subsequently advertised said tract as trustee, sold it to John Chipley and P. T. Shearer, and conveyed same to them by his deed as such trustee, dated May 30, 1893. The plaintiff, in his bill filed in this case to remove said conveyance made by C. W. Dailey to Chipley and Shearer as a cloud upon his title, alleges that the land directed to be sold by the decree of September, 1884, was not embraced in the trust deed in favor of Harper to Randolph, and a reference to that decree shows that the trust debt of Harper for four hundred forty-one dollars and sixty cents was adjudicated as a lien on two hundred and ninety-eight acres, the residue of said four hundred acres, which is conceded to be the three hundred and twelve and one-half acre tract, and the decree in the case of *Anvil v. Harness*, which confirmed the sale of the Harness lands, expressly provided that the trust lien due to Harper, and a specific lien on said two hundred and ninety-eight acre tract mentioned in the report of Commissioner Adams, should not be paid by Commissioner Parsons out of the proceeds of the sale of said lands, and the right of enforcing said trust lien against said two hundred and ninety-eight acre tract was expressly reserved to said Harper, which right, as we have seen, he subsequently exercised by requiring C. W. Dailey, who was substituted as trustee in the room and stead of William M. Randolph, deceased, to advertise and sell said two hundred and ninety-eight, or three hundred twelve and one-half acre tract, at which sale said Chipley and Shearer became the purchaser and acquired the title thereof on May 30, 1893. It appears from the bill and exhibits that said Harness, by deed bearing date of September 4, 1885, conveyed said three hundred twelve and one-half acre tract with others to A. B. Parsons, trustee, to secure and indemnify said S. H. Shaffer as his surety on several notes, but this trust was long subsequent to the trust executed thereon t

William M. Randolph, trustee, and for that reason said Harness could only convey the equity of redemption, and it does not appear that any sale was ever made under said trust deed. Now, while it is true the plaintiff's bill alleges that on the 2d of October, 1889, S. H. Shaffer and wife conveyed this tract of three hundred twelve and one-half acres of land to the plaintiff, yet it is clear that Shaffer never acquired any title to said tract; that before he became interested in any manner in said land the title of said three hundred twelve and one-half acre tract had been conveyed by A. C. Harness to W. H. Randolph, trustee, and, as we have shown, was sold by his successor, C. W. Dailey, trustee, to Chipley and Shearer; and if plaintiff took possession, as is alleged, he did so in the absence of any title. As to the title of Shaffer to said three hundred twelve and one-half acre tract, from whom plaintiff claims to have derived his title by the deed of October 2, 1889, said Shaffer in his answer to plaintiff's bill claims that he derived title thereto by purchase from A. B. Parsons, trustee; but, as we have seen, Harness did not convey said tract to Parsons, trustee, until September 4, 1885, at which time the legal title was in W. M. Randolph, and he only could have acquired the equity of redemption in said tract, and that was extinguished by the sale under said first trust deed by C. W. Dailey, who was substituted for Randolph, so that it is clear that said S. H. Shaffer had no title to the land in controversy and passed none to the plaintiff by his deed of October 2, 1889. The plaintiff's bill was demurred to by S. H. Shaffer, C. W. Dailey, J. J. Chipley, Gottlieb Hutter and Benjamin Dailey. These parties, together with A. B. Parsons, answered the plaintiff's bill, putting in issue its allegations. Depositions were taken, and on the 17th of March, 1896, the case was heard and the bill dismissed, and the plaintiff appealed.

The only error assigned was that the court erred in dismissing the cause. Did the court commit an error in rendering this decree? The plaintiff in his bill appears to claim that Scaffer, the party under whom he claims, had no title, and alleges that the sale made by C. W. Dailey, trustee, to Shearer and Chipley of said three hundred and twelve and one-half acres was made without his consent

and by the concurrence and connivance of these defendants to defraud him. He, however, in no manner shows how he has been defrauded by them, or anything they have done that they had not a perfect right to do. While in his bill he alleges that the three hundred and twelve and one-half acre tract, as he is informed and believes, was not within the bounds and scope of said Shaffer's purchase of the Harness lands, and has never been owned by him,—which allegation, if true, would show that Shaffer by his deed conferred no title on him,—yet he in an indefinite way claims that he is entitled to have his rights defined, and to be extricated from the confusion and lack of identity of the lands purchased by him. In other words, he asks that the cloud occasioned by the trust sale and conveyance made by C. W. Dailey may be removed from his three hundred and twelve and one-half acre tract, and this, so far as I can discover, is relied on to entitle him to relief in a court of equity. It is true he desires to have the title derived from Shaffer by him settled and quieted, but on the face of his bill and exhibits he shows that he acquired no title from that source. He resists the title and pretention contended for by the defendants Harper, Shearer, Whiting, Vanmeter, Hutter, and Dailey, trustee, and calls for discovery thereto, and the establishment of any claim they have to said land, but his bill and exhibits show that he has no title himself and is entitled to no discovery. He also prays an injunction to restrain the recording of, or attempting by process of law to acquire, the right or title of any of them under any title by or through the said Dailey, trustee, but there is no affidavit to support the bill. Plaintiff also prays for a discovery as to the manner in which the Harper claim attached to and affected said three hundred and twelve and one-half acres all of which is fully shown in the proceedings had in chancery cause of *Anvil v. Harness, et al.*, the record of which case is made an exhibit with the plaintiff's bill; so that, in my opinion, the circuit court committed no error in dismissing the plaintiff's bill, if the demurrers alone were relied on; but when we look to the final decree the cause appears to have been heard upon its merits, upon full denial of the allegations of the bill in the answers, and upon the proofs taken in the cause. Look-

ing at the entire record, my opinion is that the court committed no error in dismissing the bill. The decree complained of is therefore affirmed,

Affirmed.

CHARLESTON.

HYRE *et al.* v. LAMBERT.

Submitted Sept. 15, 1898—Decided Dec. 17, 1898.

1 COMMISSIONER IN CHANCERY—*Appeal—Record.*

Where questions of fact are referred to and passed upon by a commissioner, and the findings of the commissioner are overruled and disaffirmed by the circuit court, the appellate court must determine for itself, from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner or that of the circuit court. (p. 727).

2. COMMISSIONER IN CHANCERY—*Appeal—Reversal.*

A case in which the appellate court, upon the facts and evidence reversed the action of the circuit court in overruling the findings of the commissioner and in sustaining exceptions taken to the commissioner's report. (p. 727).

Appeal from Circuit Court, Tucker County.

Bill by R. A. Hyre and J. S. Hyre. against James H. Lambert. Decree for defendant and plaintiffs appeal.

Reversed.

W. B. MAXWELL and J. F. HARDING, for appellants.

DAYTON & DAYTON and L. S. AUVIL, for appellee.

McWHORTER, JUDGE :

This cause was brought here by plaintiff Hyre on appeal from a decree in favor of defendant against plaintiff on settlement of partnership accounts. The decree was reversed (see 37 W. Va. 26, 16 S. E. 446), and cause remanded for further proceedings by recommittal to commissioner to retake, state and report such accounts. The circuit court acted on the suggestion of this Court as to facts to be reported, and referred the cause to commissioner John J. Adams, directing him to report as follows: (1) The amount of bonds, notes, and accounts that went into the hands of defendant, Lambert, to settle and collect; (2) what amount he collected or should have collected; (3) what amount he has properly paid out; (4) what amount remains uncollected, and with which he should not be charged; (5) what amount is insolvent, what barred by the statutes of limitations, or otherwise noncollectible; (6) what debts or liabilities, if any, unpaid, remain, of the firm, to persons who are not partners; (7) what advances (as distinguished from capital put in), if any, have been made by any partners to or for the firm. Appellant Hyre sued out execution against appellee, Lambert, for one hundred and seventy-eight dollars and twenty-nine cents, costs of appeal incurred in this court, when Lambert filed his bill against R. A. Hyre and Jacob S. Hyre, her husband, to enjoin the enforcement of the collection of said sum, alleging that there was due from Hyre a much greater sum, for which he was entitled to a decree in said cause upon a settlement of the partnership accounts for which Hyre had instituted the suit, and alleging the insolvency of said Hyre, and that the object and purpose was to collect the said judgment for costs before her liability to plaintiff could be ascertained and fixed by proper decree; and then by every means evade the payment of such decree and praying that defendants be enjoined and restrained from the collection of said costs, that the liability of said partnership due plaintiff might be ascertained and fixed by proper decree in said original cause, and that the judgment for costs might be set off against

said liability, and decree be rendered for plaintiff for residue and for general relief. Injunction was granted as prayed for, March 8, 1893. Defendants waived process, and on 22d of November, 1894, by leave of the court, filed their joint and separate answer to said bill, and moved to dissolve the injunction; the answer admitting the former decree against Rebecca A. Hyre, which had been reversed, and her judgment for costs, but denying most positively her insolvency, or her intention to collect costs and then evade payment of any amount which might be found due to plaintiff, and denying any indebtedness to plaintiff on a settlement of the partnership affairs, but averring, on the contrary, that on such settlement plaintiff was largely indebted to her, and averring that since the injunction was awarded in this cause the said suit to settle the partnership had been pending before one of the commissioners of the court, who had taken a large amount of proof and had sifted the case to the very "dregs," and had found the sum of \$—— in favor of the respondent Rebecca A. Hyre, which amount respondent did not believe was the true amount due her, but that it should be a much larger amount, and referred to the commissioner's report, which she asked to be read with her answer, which report conclusively showed that she was entitled to have the injunction dissolved. Commissioner Adams returned his report, which, leaving off the formal portion, is as follows:

Proceeding "to fully execute said order of reference, and to further audit and state and settle the partnership accounts between the plaintiff R. A. Hyre and the defendant, James H. Lambert, thereupon I ascertain and find as follows, to wit:

"From the testimony, which is somewhat conflicting, your commissioner finds that, in his opinion, a clear preponderance thereof sustains the items of account between said plaintiff and defendant, as follows: (1) The amount of bonds, notes, and accounts that went into the hands of defendant, Lambert, to be settled and collected (including the amount of \$1,124 collected by him on the Dry Fork and Red Creek lumber contracts) I have ascertained to be \$3,374. (2) The amount he collected, or should have collected, I have ascertained to be \$2,535.12. (3) The amount

properly laid out by him I have ascertained to be \$2,922.84. (4) The amount uncollected of said accounts, and with which said Lambert should not be charged, including insolvent, barred by statute, and otherwise noncollectible claims, I find to be \$838.88. (5) I find there are no debts or liabilities remaining unpaid of the firm to persons who are not partners. (6) I further find that there is due from the defendant, Lambert, to the plaintiff, R. A. Hyre, individually, as formerly reported, a balance found due her at the February settlement, 1885, of \$200; also a settlement made August 15, 1885, a balance of \$64.83; total, \$264.83.

"From the foregoing, I find the accounts, more briefly stated, to be as follows: Amount of bonds, notes, and accounts that went into the hands of said Lambert to be settled and collected as above stated, \$3,374; less amount of uncollected notes, accounts, etc., as above stated, \$838.88; leaving amount in hands of said Lambert to be accounted for, \$2,535.12; amount properly paid out by said Lambert on firm debts as aforesaid, \$2,922.84; balance due said Lambert from the firm of Lambert & Hyre, \$387.72; one-half to be paid, Mrs. Hyre to said Lambert, \$193.86; amount due from said Lambert to Mrs. Hyre, individually, and as formerly found and reported as above stated, \$264.83; balance now found due from said Lambert to Mrs. R. A. Hyre, \$70.97.

"All of which is respectfully submitted to the court this 29th day of September, 1894. Jno. J. Adams, Commissioner."

To this report he added the following statements made at the request of the counsel for the parties, which statements, together with exceptions to said report indorsed by the parties, are as follows:

"At the request of counsel for the plaintiffs, I state and report said partnership accounts to be as follows: First. the amount of bonds, notes, and accounts that went into the hands of defendant, Lambert, to be settled and collected, I ascertain to be \$3,374. Second. The amount he collected, or should have collected, I have ascertained to be \$2,705.78. Third. The amount properly paid out by him I have found to be (uncertain and objected to) \$2,856.64. Fourth. The amount uncollected of said accounts, and with

which said Lambert should not be charged, including insolvent, barred by statutes, and otherwise uncollectible claims, I find to be \$668.22; and from undisputed items due from defendant, Lambert, to Mrs. Hyre, from former reports, \$299.83. Fifth. I further find there are no debts or liabilities remaining unpaid of the firm to persons who are not partners.

"From the foregoing version of the plaintiffs. I find the said accounts, more briefly stated, to be as follows: Amount of bonds, notes, and accounts that went into the hands of James H. Lambert for collection, \$3,374; amount of notes, accounts, etc., not collected or collectible, \$668.22; amount of notes, accounts, etc., collected by said Lambert and to be accounted for, \$2,705.78; amount of debts properly paid by said Lambert for the firm of Lambert & Hyre, \$2,856.64; amount due Lambert from said firm, \$150.86; one-half of this last-named sum due from Mrs. Hyre to Lambert, \$75.43; amount due from said Lambert to Mrs. Hyre, individually, at the time of dissolution, on account of undisputed items due Mrs. Hyre, as shown by former reports herein, \$299.83; balance now found due from said Lambert to Mrs. Hyre, \$224.40.

"And, at the instance and request of counsel for defendant, Lambert, I further state and report said partnership accounts to be as follows: First. The amount of bonds, notes, and accounts that went into the hands of James H. Lambert to settle and collect I ascertain to be \$2,423.88. Second. The amount he collected, or should have collected, I find to be \$1,518.60. Third. The amount properly paid out by him I have found to be \$2,993.24. Fourth. The amount uncollected of said accounts, and with which Lambert should not be charged, including insolvent, barred by statute, and otherwise noncollectible claims, I find to be \$905.28. Fifth. I further find there are no debts or liabilities remaining unpaid of the firm to persons who are not partners.

"From the foregoing version by the defendant, I find the said accounts, more briefly stated, to be as follows:

"Amount of bonds, notes, and accounts that went into the hands of said Lambert for collection, I find to be \$2,423.88; amount of notes, accounts, etc., collected by him,

\$1,518.60; amount with which said Lambert should not be charged, \$905.28; total, \$2,423.88.

"Amount of firm debts properly paid by said Lambert, \$2,993.24; from which deduct total amount of collections, \$1,518.60; leaving a balance paid by said Lambert for the firm out of his own private fund of \$1,474.64; one-half of which balance should be charged to defendant Hyre, \$737.32, subject to credits as follows:

"Amount of costs of the supreme court, \$174.89; amount of balance found due Mrs. Hyre at the August settlement, 1885, \$64.83; total, \$239.72.

"Balance due Lambert at this date, \$497.60.

"All of which is respectfully submitted to the court this the 20th day of September, 1894. John J. Adams, Commissioner.

"And now, on this day, to-wit, Monday, the 1st day of October, 1894, I further report to the court that, after the completion of the foregoing statement and report, I retained the same in my office ten days for inspection and exceptions thereto by any person interested therein, during which time the plaintiff R. A. Hyre, by her counsel, Maxwell & Harding, as well as the defendant, James H. Lambert, by his counsel, Dayton & Auvil, each filed exceptions in writing thereto; which several exceptions, together with all the evidence and proofs filed before me, I now herewith return to the court. Given under my hand this the said 1st day of October, 1894. Jno. J. Adams, Commissioner."

Exceptions by Rebecca A. Hyre:

"The plaintiff Rebecca A. Hyre excepts to the report of Commissioner J. J. Adams made in the above-styled cause, and to be filed for the November term of the circuit court of Tucker County, 1894, and now in the office of said commissioner for examination, for the following reasons: First. Because said commissioner reports the amount of debts due to the firm of Lambert & Hyre, and heretofore turned over to Lambert for collection and disbursement which have turned out to be uncollectible and worthless, at the sum of \$838.88, when the proofs filed before him clearly show that this sum could not possibly exceed \$668.22, and even a much less sum than this is sustained

by the evidence. Second. Because by said report said commissioner reports the assets or funds coming into said Lambert's hands to be disbursed for the benefit of said firm at the sum of \$2,535.12, when in fact he actually collected and should be charged with at least \$2,705.78, and even more than this sum is proven by a preponderance of the evidence filed. Third. Because by said report said commissioner reports the amount properly paid out by said Lambert upon the debts assigned said firm at \$2,922.84, when the evidence clearly shows that at most he only paid out the sum of \$2,856.64, and much of this amount rests on such doubtful and contradictory evidence that it ought not to be sustained. Fourth. Because by said report said commissioner has not allowed her credit for \$35, the price of one cow, hereinbefore reported, passed upon, and not excepted to. Fifth. Because by said report said commissioner reports a balance due from said Lambert to said R. A. Hyre, of \$70.97 only, and that, too, without interest, when, in fact, under the evidence filed before said commissioner, she should recover at least the sum of \$224.40, with interest from July 25, 1889. Rebecca A. Hyre, by counsel. Maxwell & Harding, Attys."

Defendant's exceptions:

"The defendant James H. Lambert, excepts to the confirmation of Commissioner John J. Adams' report made in said cause of date the — day of September, 1894: (1) Because the said commissioner charges the defendant, Lambert with the sum of \$3,374 of notes, accounts, etc., when the proof no where shows more than the sum of \$2,423.88 worth of accounts, notes, etc., with which he should be charged. (2) Because said commissioner allows to the plaintiff \$200, as and at the February settlement between said partners, when a preponderance of the proof shows that said amount was carried into the August settlement, 1885, which was a full and complete settlement of all the individual transactions between said partners of H. Lee Nester, J. H. Lambert, J. B. Lambert, and C. C. Lambert. (3) Because the commissioner considered the deposition taken by the plaintiff (in making up said report) at Justice Coberly's, in Randolph County, on the 27th day of August, 1894, and at G. W. Summerfield's residence on the

29th day of August, 1894, when the defendant, James H. Lambert, had no notice of the taking of the same.

4) Because said commissioner gave due weight and credit to the deposition of Jacob G. Flanagan in his findings, when he should have discarded said statements altogether, as said witness was successfully impeached before said commissioner. (5) Because said commissioner charges said defendant with \$1,125 collected on lumber after dissolution of said firm, when the proof shows that \$200 of said sum has been collected before the dissolution of said partnership, and applied upon the debts of said firm, and, if charged to defendant, defendant should have had credit for more, which said commissioner wholly disallows. (6) Because said report is erroneous in many other respects, and prays that the proofs, books, evidence, etc., before said commissioner be turned into court with report. James H. Lambert, by Counsel: Dayton & Auvil, Attys.

"The defendant, Jas. H. Lambert, excepts to the special finding of the commissioner at the instance of the plaintiffs, and to the finding at his own instance, and insists the only true statement of the partnership is that found at the instance of the defendant. James H. Lambert, by Counsel. Dayton & Auvil."

On the 28th day of November, 1894, the cause was heard. The court overruled all the exceptions of plaintiff Hyre, and sustained all the exceptions of defendant, Lambert; adopted the statement made by Commissioner Adams at the request of defendant Lambert; entered a decree in his favor against Rebecca A. Hyre for four hundred and ninety-seven dollars and sixty cents, with interest from October 20, 1894, and perpetuated the injunction, and decreed in favor of Lambert for costs of the injunction proceedings, and that the said sum of four hundred and ninety-seven dollars and sixty cents, together with the costs incurred by said Lambert in said two causes, are a lien upon said Rebecca A. Hyre's separate personal property, and a charge upon the rents, issues, and profits of her separate real estate, if any such personal or real estate she has; from which decree Rebecca A. Hyre, and J. S. Hyre appealed to this Court, and assign as error, first,

that the court erred in overruling plaintiff's exceptions to the report of Commissioner Adams. Defendant, Lambert, filed a "statement of amount remaining uncollected, and with which Lambert should not be charged, insolvent and barred by statute," amounting to one thousand dollars and ninety cents. The commissioner took the testimony of various witnesses as to the payment of some of these claims, and as to their solvency; the time of their payment, if paid,—whether before or after the dissolution of the partnership; and, after considering the evidence, he reduced the aggregate to the sum of eight hundred and thirty-eight dollars and eighty-eight cents. From an examination of the evidence touching the several items of account in dispute, I have no doubt that the commissioner arrived at about the right conclusion as to this item of his report. Defendant, Lambert, himself, while he claims in his deposition the amount to be one thousand dollars and ninety cents, admits in the statement made at his request by the commissioner, that the amount should be reduced to nine hundred and five dollars and twenty-eight cents.

Appellant's second exception involves the question raised by appellee's first exception. The commissioner takes as a basis three thousand three hundred and seventy-four dollars as amount of bonds, notes and accounts that went into the hands of Lambert to be settled and collected, from which deducting above item of eight hundred and thirty-eight dollars and eighty-eight cents, leaves two thousand five hundred and thirty-five dollars and twelve cents amount of assets that went into the hands of Lambert. Hyre's exception claims that it should have been two thousand seven hundred and five dollars and seventy-eight cents, while Lambert, by exception No. 1, claims that the three thousand three hundred and seventy-four dollars should have been but two thousand four hundred and twenty-three dollars and eighty-eight cents. This amount claimed by Lambert, however, fails to include the amount of the Red Creek lumber contract, the proceeds of which amounted, according to the various witnesses axamined concerning it, to from nine hundred and twenty-five dollars to one thousand two hundred dollars, and in the commissioner's report formerly filed in the cause, and copied

in the opinion (37 W. Va. 32, 16 S. E. 446), was stated at one thousand one hundred and twenty-four dollars "as shown by deposition of Lambert." Taking the smallest amount, nine hundred and twenty-five dollars, and adding it to the two thousand four hundred and twenty-three dollars and eighty-eight cents, as claimed by Lambert, makes the sum of three thousand three hundred and forty-eight dollars and eighty-eight cents, being only twenty-five dollars and twelve cents short of the amount stated by the commissioner. I think plaintiffs' second and defendant's first exceptions should both be overruled.

Plaintiffs' third exception goes to a question of sixty-six dollars and twenty cents difference between the amount allowed by the commissioner to defendant as paid out on debts of the firm and the amount plaintiffs claim ought to have been allowed. This difference is made up of small sums, upon which the evidence is conflicting and uncertain, and the benefit of the doubt should be given to commissioner, who stands between the parties, and should be, and evidently was, trying to get at the truth of the matter.

Plaintiffs' fourth exception is as to thirty-five dollars, price of a cow, which was proved as reported in commissioner's former report, and unexcepted to, and the exception should be sustained.

The fifth exception of plaintiffs, in so far as it claimed the right to judgment for at least two hundred and twenty-four dollars and forty cents was properly overruled.

Upon defendant's second exception, as to the two hundred dollars found due plaintiffs at February settlement, 1885, and allowed to plaintiffs, and as claimed by the defendant to have been carried into the settlement of August 15, 1885, the evidence is conflicting; some witnesses testify positively and squarely that the item of two hundred dollars was carried into the settlement of August 15th, while others testified as positively that it was not. In the commissioner's report of former date, and copied in the opinion of this Court in 37 W. Va. 32, (16 S. E. 446), as to this item, it was held by the commissioner, as he holds in in this last report, that it was not carried into the late settlement, and no exception was made to the report by defendant for that reason, and he took his decree allowing

that claim. The commissioner was warranted in allowing it to plaintiffs, and exception two should have been overruled.

The third exception of defendant relates to notice to take depositions, upon the depositions taken at G. W. Summerfield's, not at J. W. Summerfield's, as specified in the notice, "because the defendant had no notice of the taking of any depositions except of Solomon Flanagan, Enos G. Carr, and J. W. Flanagan." When the depositions of said Flanagans do not appear to have been taken, and that Enos G. Walker is taken as the fifth deposition of about thirty or more short depositions, of about three to the page, taken to sustain the reputation for truth and veracity of plaintiffs' witness Jacob G. Flanagan, whose reputation defendant had brought in question, it is difficult to conceive how defendant should have notice of one deposition grouped in some thirty, which would require perhaps five minutes each to take, and know nothing of the taking of the others. How far the commissioner gave weight to or considered such depositions does not appear. There is but little in the depositions complained of, aside from the bearing on the reputation of said witness to sustain it.

The fourth exception is that the commissioner gave due weight to the testimony of Jacob G. Flanagan, witness on behalf of plaintiffs. Flanagan was plaintiffs' principal witness, apparently a man of very good standing in the community, trusted by his neighbors with the responsible position of assessor. He had given testimony in this cause in October, 1887, and the cause was heard upon his testimony. The thought of impeaching him seems to have been a recent thought. Jacob Wolfred says his reputation is not very good, and would not from that reputation believe him on oath, especially if he was interested in the matter in any way. John T. Wolfred is acquainted with his reputation; "it's nothing extra good." In answer to question, "From that reputation would you believe him on oath?" he says, "If his interest was at stake, and he was under the influence of liquor, I would be inclined to dispute." Witness G. W. Snyder, referring to Flanagan's reputation: "Well sir, I would say it was bad. Q. From that reputation would you believe him on oath? A. No,

sir." Defendant then introduces two of his sons, L. D. and J. B. Lambert, who say, respectively, as to his reputation, "It is not good," and "It is bad," and both say they could not believe him on oath. J. B. Lambert, when asked if he and Flanagan were friendly or he had had trouble with him, answered, "We had some words, but still I would not vary on oath for that." Snyder is the only one of the first three witnesses who says unqualifiedly that his reputation is bad. I know it is a delicate matter for a man to take the witness stand and testify that the reputation of his neighbor for truth and veracity is bad; but, if it is notoriously bad, after one or two reputable and respectable citizens have so testified it is usually not much trouble to find others at hand to "swell the chorus." I think the attempt to impeach Flanagan a very lame one, and the commissioner was at liberty to give his testimony such weight as seemed right to him.

Defendant's fifth exception is that the commissioner had charged him with one thousand one hundred and twenty-five dollars collected on lumber after dissolution of the firm, when the proof shows that two hundred dollars of said sum had been collected before the dissolution of the partnership, and applied on firm debts. I think quite a sufficient reply to that is that in the original report of the commissioner, which was the basis of defendant's decree before brought to this Court, the very first item charged to defendant was, "Amount collected on the Red Creek and Dry Fork lumber contracts from the Hulings Lumber Company, as shown in the deposition of said Lambert, \$1,124." Said item was proved by his own deposition, allowed by the commissioner, no exception to the report, and defendant's decree based on it.

As to the sixth exception, praying that the proofs, books, evidence, etc., before the commissioner, be returned into court with his report, section 7, chapter 124, Code, as amended by chapter 8, Acts 1895, requires the commissioner "with his report, to return the evidence filed in the case, including all the evidence taken upon the execution of the reference," which the certificate of the commissioner shows he did in this cause.

Defendant's seventh exception insists that "the only

true statement of the partnership is that found at the instance of the defendant," and the court seems to have thoroughly ignored the findings of its commissioner, and adopted the account made up by the defendant, very much of which is unsustained except by the evidence alone of the defendant, and even he is not clear in parts of his evidence. It is shown that when the partnership was dissolved the books of the firm were placed in the hands of defendant, where they remained for some time, until they were called for in this cause; and when they came from his hands they were so mutilated that it would be impossible to make a statement showing the amount of accounts which were upon them when they were given over in August, 1885. Several half leaves, and some whole leaves, were out of the books, and figuring and writing in the books which were not in them when they were calculated and footed up before. J. S. Hyre testified that with reasonable diligence all the notes, bonds, and accounts belonging to the firm, and turned over to Lambert, amounting to some two thousand two hundred and fifty dollars could have been collected, except about twenty-five dollars or thirty dollars; and J. G. Flanagan who was familiar with them, did not think there was over about twenty dollars which could not be collected. In *Graham v. Graham*, 21 W. Va. 698, it is held that, "where questions of fact are submitted to a commissioner in chancery, his findings thereon should be fully sustained, unless the court is fully satisfied that the evidence before the commissioner does not warrant them;" and it is further held when the decree of the court below approves such findings, this Court will not, except in a plain case, reverse such decree. "Where question of fact are referred to and passed upon by a commissioner, and the findings of the commissioner are overruled and disaffirmed by the circuit court, the appellate court must determine for itself, from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner or that of the circuit court." *Root v. Kilbreth*, 32 W. Va. 585, (9 S. E. 627).

On a review of all the evidence and the record, I am of opinion that the commissioner was about as nearly right as the character of the case would enable one to get, and that

his finding in favor of plaintiff of seventy dollars and ninety-seven cents should be approved, with the sum of thirty-five dollars added, making the sum of one hundred and five Dollars and ninety-seven cents in favor of plaintiff Rebecca A. Hyre against the defendant, Jas. H. Lambert; that upon the filing of the answer of Rebecca A. Hyre and James S. Hyre to the bill of complaint of James H. Lambert; denying all the material allegations of the bill and moving to dissolve the injunction, said injunction should have been dissolved and the bill dismissed. *Schoonover v. Bright*, 24 W. Va. 698; *Farland v. Wood*, 35 W. Va. 458, (14 S. E. 140, Syl. point 2).

For the reasons herein contained, the decree of the circuit court is reversed and annulled, and the order perpetuating the injunction is reversed and set aside. It clearly appears from the record that there is no indebtedness against the firm; and, the court proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered and decreed that the plaintiff Rebecca A. Hyre do recover of the defendant, James H. Lambert, the sum of one hundred and five dollars and ninety-seven cents, with interest thereon from October 20, 1894, until paid, and the costs of the prosecution of her suit by her expended in the circuit court; and it is further adjudged, ordered and decreed that the injunction awarded James H. Lambert against J. S. Hyre and Rebecca A. Hyre be, and the same is dissolved, and the bill dismissed, and that the defendants therein recover against the plaintiff, James H. Lambert, their costs by them about their defense in that behalf expended in said circuit court.

Reversed.

CHARLESTON.

JONES v. SHUFFLIN.

Submitted Sept. 26, 1898—Decided Dec. 17, 1898.

1. *APPEAL—Bill in Equity.*

An objection to a bill in chancery, made for the first time in this Court, for the reason that it is not signed by counsel, will not be entertained. (p. 730).

2. *TENANCY FOR LIFE—Remainder Man—Removal of Buildings.*

After the expiration of a life tenancy in a town lot by death, and the termination of a lease thereunder, the lessee cannot remove buildings put on such lot during the continuance of such tenancy. Such buildings become a part of the realty, and go to the person entitled to the remainder. (p. 730)

Appeal from Circuit Court, Tyler County.

Bill by Clark E. Jones against M. B. Shufflin. Decree for plaintiff. Defendant appeals.

Affirmed.

THOS. P. JACOBS and F. D. YOUNG, for appellants.

ROBERT MCELDOWNEY and G. M. MCCOY, for appellees

DENT, JUDGE:

S. Stephens and Amanda Stephens, holding a life tenancy, in a certain lot in the town of Sistersville, Tyler County, W. Va., with remainder in Clara E. Jones, leased the same to M. B. Shufflin for a period of years extending to the 1st day of April, 1900. Clara E. Jones did not consent to or join in either of these leases (there being two of them), but, on being applied to, positively refused to do so. To the

first lease Mrs. J. S. Jones (now Mrs. Shufflin) was a party, but she was not made a party to this suit. These leases were terminated by the death of the surviving life tenant, Mrs. Amanda Stephens, the 2d day of January, 1897. See *Shufflin v. House*, 45 W. Va. 731, (31 S. E. 974). During their existence M. B. Shufflin erected a large frame building on the lot which he leased to House & Hermann, who were in the occupancy thereof at the time the leases terminated. This building was constructed on a good, firm foundation, and was connected with the street sewerage, at the expense of the life tenancy. Defendant Shufflin undertook, after the termination of his lease aforesaid, to remove the building from the lot. Clara E. Jones, plaintiff, enjoined such removal, and, at the hearing of the cause on bill and answer, general replication, and depositions, the injunction was perpetuated. The defendant appeals, and claims: First. That the bill was not signed by an attorney. This is an objection that should have been taken in the circuit court, and cannot be taken for the first time in this Court. Second. That Mrs. J. S. Jones was not made a party, while she is a party to the leases, or one of them. There is nothing to show that she was attempting to remove the building, and it will be time enough to enjoin her when she does undertake to do so. She was not a necessary party, as no relief is sought against her.

Defendant insists he had a right to remove the building—First, because his tenancy had not terminated; and, second, it remained his by virtue of the law of fixtures. The first of these questions is settled adversely to defendant's claim in the case of *Shufflin v. House*, before cited. As to the second question, the law is well settled that the remainder-man is entitled to the property with all improvements thereon at the expiration of the life tenancy. In the case of *White v. Arndt*, 1 Whart. 91, it is held: "(1) Even as between landlord and tenant, fixtures erected by the latter; and which he is entitled to remove, must be removed during the term; after the expiration of the term the tenant can neither remove them nor recover their value from the landlord. (2) This rule prevails more strictly between tenant for life or his lessee and the remainder-man, the latter of whom is not bound by any agreement between the

tenant for life and his lessee under which the lessee may have erected buildings on the land." *Hafflick v. Stober*, 11 Ohio St. 482; *Austell v. Swann*, 74 Ga. 278; *Dean v. Feely*, 69 Ga. 804. The plaintiff, being entitled to the remainder, and not having consented to the lease, is in no wise bound thereby, and the improvements come to her as though they had been placed thereon by a stranger. If a building is erected on land against the will of the landowner, or without his consent, it becomes realty, and cannot be removed therefrom without the commission of waste. *Bonney v. Foss*, 62 Me. 248; *Cannon v. Copeland*, 43 Ala. 252; *Dart v. Hercules*, 57 Ill. 446; *Honzik v. Delaglise*, 65 Wis. 494, (27 N. W. 171). The defendant in this case acted with open eyes. He erected the building against the consent and against the known will of the plaintiff. He allowed it to remain until after the expiration of the life tenancy and the termination of his lease, and thereby, if he might have done so before, he cannot remove the same. It has become a part of the realty, and belongs to the plaintiff. The court did right to perpetuate the injunction, and its decree is affirmed.

Affirmed.

CHARLESTON.

SHUFFLIN v. HOUSE *et al.*

Submitted Sept. 26, 1898.—Decided Dec. 17, 1898.

45	731
45	730

1. LAND—*Town lots.*

The word "land" in section 1, chapter 94, Code, is used in a restricted sense to denote agricultural or farming land, and not town lots used for building purposes alone. (p. 733).

2. TENANCY FOR LIFE—*Lease—Duration of Lease—Death of Life Tenant.*

All unexpired leases given by a life tenant on town lots used for building purposes alone terminate with the death of such life tenant, and do not continue in force until the end of the current year. (p. 733).

Error to Circuit Court, Tyler County.

Suit by M. B. Shufflin against House & Hermann and others. Judgment for plaintiff, and defendants bring error.

Reversed.

ROBERT McELDOWNNEY, GEORGE W. MCCOY and HOWARD & HANDLAN, for plaintiffs in error.

T. P. JACOBS and F. D. YOUNG, for defendant in error.

DENT, JUDGE:

S. Stephens and Amanda Stephens, holding a life tenancy in a certain lot in the town of Sistersville, Tyler County, W. Va., with remainder in Clara E. Jones, leased the same to M. B. Shufflin for the period of from one to five years, ending on the 12th day of May, 1897. This lease was afterwards extended to the 1st day of April, 1900. Clara E. Jones did not consent to, or join in either of the leases. Amanda Stephens, the surviving life tenant, died the 2d day of January, 1897. In the meantime M. B. Shufflin sublet the property to House & Hermann at the rate of one hundred and fifty dollars. House & Hermann paid Shufflin up to including the date of the death of Mrs. Stephens, and then released the property from Mrs. Jones. Shufflin, claiming the rent from Mrs. Stephens' death up to the end of the current year, to-wit 12th May, 1897, levied two distress warrants on the property of House & Hermann. They gave forthcoming bonds, and this suit is on such bonds to recover the balance of such rent. The circuit court gave judgment against the defendants for the sum of three hundred and sixty dollars, and they come to this Court.

The only question presented is as to whether M. B. Shufflin or Clara E. Jones is entitled to the rent from the 2d day of January, 1897, to the 12th day of May, 1897, being from the date of the death of Mrs. Stephens to the end of the

current year of the leasehold. All unexpired leases made by a life tenant terminate at his death, except as otherwise provided by statute. Gear. Landl. & Ten. s. 21; 1 Tayl. Landl. & Ten. p. 421, s. 112; 12 Am. & Eng. Enc. Law, p. 758, note 1. Code, c. 94, s. 1, provides that, "If there be tenant for life or other uncertain interest in land which is let to another, the lessee may hold the land to the end of the current year of the tenancy, paying rent therefor; the rent if it be reserved in money shall be apportioned between the tenant for life or other uncertain interest, or his personal representative and those who succeed to the land." This provision the plaintiff insists governs in this case, while the defendants insist that it only applies to land used for agricultural purposes, and not to town lots or other real estate where the rent is payable in money. The word "land" in this section was no doubt used in a restricted sense to denote agricultural land rented for an annual rental, for the purpose of encouraging agriculture and securing to the tenant the harvest that he might sow. 2 Minor. Inst. pp. 101, 102. Where the reason of the law fails, the law itself is at an end "The word 'land' has two senses, one is general and one restricted. If it occurs accompanied with other words which either in whole or in part supply the difference between the two senses, that is a reason for taking it in its less general sense: e. g. in a grant of lands, meadows, and pastures, the former word is held to mean only arable land. Burt. Real Prop. 183; Cro. Eliz. 476, 659; 2 And. 123; *Van Gorden v. Jackson*, 5 John. 440." Bouv. Law Dict. The reason for taking the word "land" in its less general sense as farming or agricultural land is from the context and the true purpose of the enactment, being to secure to the person who sows and cultivates the right to reap and enjoy. In the case of town property no such necessity exists. If the statute was applicable, all the tenant could do, even thereunder, would be to collect the rent and pay it over to the remainder-man. He is only entitled to the rent up to the date of the death of the life tenant. Why, then, permit him to collect rent which belongs to another, or retain control of property in which he has no possible interest? With agricultural land it is different. A yearly rental or

a portion of the crop is usually reserved, and according to common law the subtenant, in case of the death of the life tenant, was entitled to the emblements. The object of the statute was to declare the common law and make it effective, and was in no sense to apply to town property rented for a monthly rental, of whatever term. As to such property its provisions have no application, and are wholly unnecessary and useless. Therefore the circuit court erred in rendering judgment for the plaintiff, and the same is reversed, and judgment is entered for the defendants.

Reversed.

CHARLESTON.

STEWART v. NORTHERN ASSURANCE COMPANY.

(BRANNON, PRESIDENT, *dissenting.*)

Submitted June 4, 1898—Decided Dec. 17, 1898.

1. FOREIGN CONTRACTS—*Foreign Judgments—Appearance.*

While the judgment of a competent court of any state that has jurisdiction over the person or subject matter is conclusive upon the merits of the controversy in every state, a court of another state has not the power, without service of process or voluntary appearance, to render a judgment on a contract that is absolutely void, under the statutes of the state where it is made. (p. 741)

45 734
47 698

45 734
58 283

2. FOREIGN CONTRACTS—*Foreign Attachment—Garnishment—Payment by Garnishee.*

If such a void contract is sued on by a foreign attachment in a foreign jurisdiction, the garnishee must make defense to the action, or notify, if practicable, his absent creditor of the pendency of the attachment proceedings, that such creditor may make such defense; otherwise, a judgment rendered by default will not protect the garnishee when sued by his creditor. (p. 739)

Error to Circuit Court, Hancock County.

Action by Mary A. Stewart against the Northern Assurance Company. From a judgment in favor of plaintiff, defendant brings error.

Affirmed.

ERSKINE & ALLISON, for plaintiff in error.

HUFF & DONEHOO, for defendant in error.

MCWHORTER, JUDGE :

Mary A. Stewart, a married woman, was the owner of an hotel and furniture in New Cumberland, Hancock County, which was insured by the Northern Assurance Company, of London, England, which had its central or principal office in the United States, at Cincinnati, Ohio. A loss occurred by fire, which was duly adjusted at one thousand seven hundred dollars; and, before the money was paid to the assured, Porter & Co., a corporation doing business at New Cumberland, brought an action before Louis Hauser, a justice of the peace, at Cincinnati, Ohio, on a store account against Mary A. Stewart, and sued out an attachment against the property of said Stewart, and cited the said assurance company to answer as garnishee, as the debtor of said Stewart. In obedience to the summons duly served on it, the company appeared and answered, admitting its indebtedness to Stewart, when the justice heard the case, rendered judgment against the defendant, and issued an order against the garnishee requiring it to pay two hundred and fifty-one dollars and seven cents, the amount of Porter & Co's judgment, which it did on the 16th of June, 1892. On the 27th of July, 1892, Mary A. Stewart brought her action against said assurance company in the circuit court of Hancock County, upon her pol-

icy of insurance, to recover the said sum of one thousand seven hundred dollars. The defendant appeared, and filed a special plea in writing, setting up the payment made by it under the said proceedings in Cincinnati of two hundred and fifty-one dollars and seven cents, and paid into court the residue of the one thousand seven hundred dollars with its interest; to the filing of which special plea plaintiff, by counsel, objected, which objection was by the court overruled, and the plea allowed to be filed, and leave was granted to plaintiff to file a special replication thereto by the 1st of April, 1893. To the special plea of defendant, plaintiff tendered her special replication, in writing, averring that at the time the contract mentioned in said special plea, and upon which the alleged judgment of Porter & Co., was recovered, was made, plaintiff was, and still is, a married woman, under coverture, domiciled and resident in the State of West Virginia, and then and ever since and there living with and not separate from her husband, William Stewart, and the said contract was made in the State of West Virginia, while she was so under coverture, domiciled, resident, and living with her husband as aforesaid, and this she was ready to verify, wherefore she prayed judgment, etc., to the filing of which special replication the defendant objected, which objection the court overruled, and permitted the same to be filed, to which ruling of the court defendant excepted.

On the 15th day of May, 1897, the case being called, and neither party requiring a jury, by consent the matters arising on the issue were submitted to the court in lieu of a jury; and the court having considered the evidence adduced and the arguments of counsel, rendered judgment for the plaintiff for the said sum of two hundred and fifty-one dollars and seven cents, and costs of the action. The defendant moved to set aside the finding and judgment, and grant it a new trial, on the ground that the same is contrary to the law and evidence, which motion the court overruled, and the defendant excepted. The bill of exceptions shows that the proceedings before Justice Hauser were regular, and the transcript thereof properly attested, certified, and proved, and it was agreed by the parties that the transcript should not be copied into the record, and that, as proven, it established and proved every allegation of

fact contained in defendant's special plea as to the proceedings in said action and the judgment by Justice Hauser against defendant, as garnishee, and the payment by it, in obedience to the order of said justice, on June 16th, 1892, of two hundred and fifty-one dollars and seven cents. It was also, agreed that it was proven that defendant, at the time it was proceeded against as garnishee, had complied with the laws of the state of Ohio with respect to foreign insurance companies doing business in that state, and was subject to be proceeded against in the courts of said state as provided by the laws thereof applicable to foreign insurance companies doing business therein, and which evidence was by the court not copied into the record. It was also agreed that the plaintiff proved by witnesses all the matters of fact alleged in her special replication. The facts and allegations both of the special plea of the defendant and plaintiff's special replication thereto were admitted by both parties to be proved at the trial, all of which is set forth in the bill of exceptions. Defendant applied for, and obtained, a writ of error, making the following assignments: First, because the circuit court should have rejected the special replication of the plaintiff to the defendant's special plea, or should have sustained the demurrer to said replication; second, because the court erred in giving effect to said replication, and in treating the facts therein set up as affecting the jurisdiction of Justice Hauser to render the judgment pleaded in the defendant's special plea; third, the court erred in overruling defendant's motion for a new trial.

Appellant's counsel, in their brief, say: "The fact that Mary A. Stewart was a married woman, residing and contracting in a state where the laws at the time held her personal contract void, would, if it had been pleaded in the Ohio court, have been a complete defense to the action of Porter & Co., because the courts everywhere, in the exercise of their undoubted jurisdiction, give force and effect to the *lex loci contractus*." They further say: "There is no evidence that the garnishee knew that she was a married woman, and the law did not require it to be concerned with any fact not affecting the jurisdiction of the court," and cite Black, Judgm. s. 595, in support of their proposi-

tion. Their position is correct to the extent said section goes, but, by their proposition that the law does not require the garnishee to be concerned with any fact not affecting the jurisdiction of the court, they assert that the garnishee owes no duty to its own creditor in the premises, which is untenable. In *Pennoyer v. Neff*, 95 U. S. 714, 727, Justice Field in delivering the opinion of the Court, says: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken when property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale," *Door v. Rohr*, 82 Va. 359, Syl. 4. It is presumed that, when property in the possession of an agent is seized on legal process, the fact is known to the agent; and in case of garnishment of funds in the hands of a debtor of the defendant who is a nonresident, and not served with process, it is clearly the duty of such garnishee, if practicable, to notify his creditor of the proceedings, that he may make such defense therein as his rights and interests may require." Appellant's special plea alleges that the process was served on it on May 2, 1892, requiring it to make answer on the 5th day of the same month, which answer it filed on said last mentioned day, when, "it appearing that the summons has not and cannot be duly served on the defendant in this county, this cause is continued to June 15, 1892, at nine o'clock A. M., for publication of notice," which is the entry made by the justice, as alleged in the special plea; that notice was duly published, and, at the time mentioned, Porter & Co. appeared, and proved their claim, and judgment was rendered against the defendant, who failed to appear, and also an order was issued on the garnishee to pay the said judgment and costs, which order was delivered to the constable; and that in obedience thereto, on the 16th of June, 1892, the garnishee paid same. In its special plea, defendant wholly

failed to alleged that it had notified, or attempted in any way to notify, the plaintiff, its creditor, of such proceeding. For want of such allegation, the plea was not sufficient in law, and the objection thereto should have been sustained. In *Morgan v. Neville*, 74 Pa. St. 52 (Syl. point 3), it is held that "a garnishee in foreign attachment, to protect himself, must give notice to his own creditor;" and this is manifestly right, *Pierce v. Railway Co.*, 36 Wis. 283 (Syl. point 1); also 8 Am. & Eng. Enc. Law, 1254, and cases there cited; *Martin v. Railway Co.*, 50 Hun. 347, (3 N. Y. Sup. 82).

It is admitted by appellant that if plaintiff had appeared and pleaded the statute of her state as it then existed, in the action before Justice Hauser, the claim of Porter & Co. must have been defeated; and yet with the full knowledge of the proceedings against her, and that she had no notice thereof, and could not be served with process, it stood by, and meekly paid out her money, in obedience to the justice's order, without even attempting, so far as the record shows, to notify her of the jeopardy of her property in its hands, all of which "smacks" strongly of collusion. Appellant cites *Virginia Fire & Marine Ins. Co. v. New York Carousal Mfg. Co.* (Va.) 28 S. E. 888, in support of its special plea, the court there holding that "it is a settled rule, founded upon obvious principles of natural justice, that a garnishee cannot be lawfully compelled to pay the same indebtedness twice. Nothing can be more clearly just than that a person who has been compelled by a court of competent jurisdiction to pay a debt should not be compelled to pay it over again. Consequently, where he is in such a situation that, if charged as garnishee, this would be the result, he will not be charged, unless his situation is due to his own fault or neglect." In that case it is shown that the garnishee was guiltless of any fraud or collusion. It took all the necessary steps to prevent a recovery in a suit pending in a North Carolina court for the same debt, pleading the garnishment in the Virginia court, but to no avail. The North Carolina court refused the plea, and rendered judgment, and issued execution, and collected the money. When it pleaded the North Carolina judgment, execution, and payment in answer to the garnishment in

the Virginia court, that court rejected the plea, and rendered judgment, which was properly reversed by the supreme court.

Appellee insists that Justice Hauser was without jurisdiction in the case, because of the facts set up in her special replication, and that the judgment rendered by said justice is void, and not entitled to the "full faith and credit" provision contained in section 1, Art. IV., Const. U. S. The appellee cites the case of *Bowler v. Huston*, 30 Grat. 266, where it is claimed the question is thoroughly discussed; but it cannot be said to cover the question raised in the case at bar. That was an action to enforce a personal judgment rendered by a New York court against Bowler, wherein there had been neither service of process nor appearance in person or by attorney. So, there was nothing upon which to found a judgment, and the record was an absolute nullity, and no question was raised of a judgment *in rem*, or involving a garnishee or substituted service in the case; and yet, under the statutes of New York, the judgment was a valid personal judgment as far as Bowler's interest was concerned in the firm with which he was sued in N. Y. In *Cooper v. Reynolds*, 10 Wall. 308, in discussing the question of jurisdiction, Justice Miller says "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. * * *

While the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. * * *

So, the writ of garnishment or attachment or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court." Under the statutes of the state of Ohio, Justice Hauser had general jurisdiction, within the limitations and restrictions con-

tained in such statutes, in all cases of the nature of this proceeding before him based on legal and valid contracts and transactions.

While a judgment of a competent court of any state that has jurisdiction over the person and subject-matter is conclusive upon the merits of the controversy in every state, I question the power of the court of another state, without service of process or voluntary appearance, to render a judgment on a contract that is absolutely void under the laws of the state where it is made, and upon which contract a judgment rendered by a court of such last-mentioned state is void, even upon process duly served. In *D'Arcy v. Ketchum*, 11 How. 165, it was held that "congress did not intend by the act of 1790 to declare that a judgment rendered in one state against the person of a citizen of another, who had not been served with process or voluntarily made defense, should have such faith and credit in every other state as it had in the courts of the state in which it was rendered." That case was based on the statute of New York which provided that when joint debtors were sued, and one was brought into court on process, if judgment should pass for plaintiff he should have judgment and execution, not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it should not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court.

It could never have been contemplated by the framers of the Constitution of the United States to include among judgments entitled to "full faith and credit," under section 1, Art. IV., a judgment obtained upon a contract absolutely void under the laws of the state where it was made, and upon substituted process. It may be said, then: Where is the protection afforded the garnishee in such case? On the other hand, what protection has the defendant, the creditor of the garnishee, in such a proceeding? The garnishee has better facilities for protecting his interests than the defendant. He is served with process. He knows of the proceeding. He can readily advise the

defendant, his creditor, thereof, and make his defense sure, if any there be; while without such notification the defendant remains in profound ignorance of the proceeding until his property is taken from him, may be on a valid, just claim or demand, possibly by the connivance of the plaintiff and the garnishee, on a void or illegal claim. In *White v. Manufacturing Co.*, 29 W. Va. 385, (1 S. E. 572, Syl.), it is held that "a judgment rendered by a court of common-law against a married woman, either in her own name or in the name of a company under which she does business, upon a contract made during her coverture, is absolutely void; and an execution or suggestion sued out upon such judgment is invalid and ineffectual for any purpose, and such judgment may be assailed collaterally in proceedings upon a suggestion thereon." I fail to see any error in the judgment, and the same is affirmed.

NOTE BY MCWHORTER, JUDGE: "

Since the foregoing opinion was handed down, I find the case of *Railroad Co. v. Nash*, (Ala.) 23 South. 825, decided in June, 1898, the syllabus of which is as follows:

"(1) The courts of one state have no jurisdiction to attach and condemn a debt due to and payable to a nonresident where he resides, by service of process on his debtor as garnishee, in the absence of personal service on the creditor within the state of the forum, or his voluntary appearance.

"(2) The payment by the garnishee of a judgment rendered for a debt against a nonresident without personal service within the state of the forum, or voluntary appearance, constitutes no defense to a subsequent suit by the judgment debtor against the garnishee.

"(3) The constitutional provision that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, does not apply to a judgment against a nonresident debtor, in the absence of personal service upon him within the state of the forum, or a voluntary appearance.'"

BRANNON, PRESIDENT, (*dissenting*):

This case is important in principle, and, regarding the decision in it as plainly erroneous and contrary to the right of the defendant under the Constitution of the United States. I must dissent.

My position is: The justice in Ohio had jurisdiction and authority under the law of Ohio to render the judgment

against the garnishee. This is not denied. This judgment had the effect there to protect the defendant against a suit by Mrs. Stewart to make him pay the money again. Having this force in Ohio, it must have the same force in every state, under the United States Constitution, providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," and the act of congress under it that judgments in a court of one state "shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." We do not go behind the Ohio judgment to see on what contract in favor of the creditor it was rendered, whether good or bad, void or not, because the only question is: Had the court jurisdiction, and did it give judgment protecting the garnishee there? 1 Greenl. Ev. s. 548. "It is a question of constitutional obligation, not of state policy, whether our courts will enforce a judgment of another state court of competent jurisdiction, having jurisdiction in the case. When a judgment or decree of the court of another state is sought to be enforced in a court in this state, the court in this state may inquire into the jurisdiction of the court which rendered the judgment or decree; and, if it appears that such court had no jurisdiction, the judgment or decree is void, but, if it had jurisdiction, the judgment or decree is valid and binding in this state." *Stewart v. Stewart*, 27 W. Va. 167. "The first question to be determined in regard to a judgment of another state, after jurisdictional inquiries have been satisfactorily answered, is, what is its effect in the state whence it was taken? The effect which it has there is precisely the effect which must be accorded to it in every other state. It must not be given any greater effect than it had in the state wherein it was rendered. If the judgment appear on its face to be harsh and erroneous, it must be received and enforced, irrespective of its harshness. The pleas which might be made to it at home, and those only, can be made to it in any other part of the Union." 2 Freem. Judgm. s. 575. The law is that it is not the domicile of the owner of the debt garnished that tests the place of jurisdiction for garnishment, but the question

whether the court had control over the garnished debtor within its territory. *Mooney v. Manufacturing Co.*, 34 U. S. App. 582, (18 C. C. A. 421, and 72 Fed. 32); *Douglass v. Insurance Co.*, 138 N. Y. 209, (33 N. E. 938).

Mrs. Stewart could sue the company in Ohio, and therefore it could be garnished there. "Foreign corporations are subject to the process of garnishment in all cases in which an original action may be commenced against them in the courts of this state to recover the debt in respect to which the garnishment process is served. * * * A foreign corporation doing business within the state may generally be made a garnishee in that state when, by the laws of the state, service of process may be properly made upon it therein; when according to the jurisdictional rule, the debt is payable within the state, or the corporation has within its control property belonging to the principal defendant." 2 Shinn, Attachm. s. 493. "When there is seizure of the defendant's property at the commencement of the action, or, in garnishment, what is equivalent to seizure at that time, namely, service of process upon the garnishee, accompanied in both cases by publication or other form of substituted service against a nonresident defendant, it is well settled that such process is due process of law in attachment suits, and that a judgment so rendered will divest the defendant of his title to such property, and will protect the garnishee from the danger of double payment." Reno. Nonres. s. 241. See *Molyneux v. Seymour*, 76 Am. Dec. 671. 2 Black. Judgm. s. 852, says: "The judgment of a foreign court of competent jurisdiction, in a proceeding in the nature of a garnishment, is binding and conclusive, and affords a complete protection to the garnishee, and the money paid under it cannot be recovered back by the original owner of the debt in any action in another country." Garnishment is a proceeding *in rem* binding everywhere (2 Shinn. Attachm. s. 486; 76 Am. Dec. 671; 1 Greenl. Ev. s. 543); at least so far as the property garnished and its owner are concerned. "The liability of property belonging to nonresidents to be attached and sold under legal process is determined by the law of the state in which the property is actually situated, and from whose courts the process issues, and is not determined by the

law of the state in which the owner resides. Hence, in case of conflict between the laws of these two states, the law of the former governs." Reno, Nonres. s. 148. "Where, however, the garnishee is a resident of the state, the fact that the principal debtor is a nonresident will not affect the validity of the garnishment proceedings, because attachments are permitted against nonresident debtors. And the fact that the principal defendant is served by publication only has no effect upon the jurisdiction of the court, when the property or debt is within the power of the court; that is to say, where the property is within the jurisdiction of the court, or the debt is payable therein." 2 Shinn. Attachm. 861. But the opinion by JUDGE MCWHORTER says that the contract of a married woman was void in West Virginia when this one was made. This is no matter. The question is the force of the Ohio judgment in Ohio. Rev. St. Ohio, s. 4996, 5319, authorize judgments on married women's contracts. Thus, the judgment is not void there. The position of JUDGE MCWHORTER is answered by many authorities. Our own Court, in *Black v Smith*, 13 W. Va. 780, held: When a court of law in the state of Maryland, having jurisdiction of the subject and person of the citizen, renders judgment in a cause therein pending, against such citizen for money, the validity of such judgment rendered by such court cannot be questioned in the courts of this state; nor will the courts of this state look into the transaction upon which the Maryland judgment is founded, in order to ascertain if that judgment ought not to have been rendered by the court." JOHNSON, PRESIDENT, in *Stewart v. Stewart*, 27 W. Va. 173 said: "But it is not on the ground that such suits have been maintained in many states that we would enforce a decree for such cause in our own courts, nor would we sustain it because it agreed with our policy, nor refuse to enforce it here because it is hostile to our policy. The reason why we would enforce a decree rendered by a court of competent jurisdiction in another state is the fact that the Constitution of the United States requires us to do so. For the wisest purposes, the states, when they formed and adopted the Constitution, provided, in section 1 of Art. IV, 'Full faith and credit shall be given in each state to the pub-

lic acts, records and judicial proceedings of every other state.' If this clause had not been inserted in the Constitution, and rigidly enforced by the judiciary in all the states, our relations as states to each other would have been anything but harmonious. Citizens, by passing from one state to another, could escape the effect of their contracts and obligations. It is not a question of state policy whether we will or will not give effect to the judgments of courts of competent jurisdiction of other states. It is a question whether we will in good faith live up to the constitutional obligations which we have assumed. In *Gilchrist v. Land Co.*, 21 W. Va. 115, we decided that, 'where a judgment rendered in another state is sought to be enforced in a court in this state, our courts may inquire into the jurisdiction of the court which rendered it, and, if it appear that the court which rendered the judgment had no jurisdiction, the judgment or decree is void, but, if it had jurisdiction, it is valid and binding in this state; that, in deciding what effect a judgment rendered in another state is to have in this, it must be regarded as well settled that it must have the same effect here as it had in the state where it was rendered. It is not an open question whether we will enforce the judgments and decrees of another state rendered by courts of competent jurisdiction having jurisdiction to render such judgment or decree. The general rule is as we have stated it. If there are any exceptions, I have not been able to find them. I do not say there can be none. If the court of common pleas of Columbia county had jurisdiction to pronounce the decree rendered there, and sought to be enforced here, we must give full faith and credit to it, and enforce it here.'" 2 Black. Judgm. s. 888, reads: "As to whether the personal disability of the defendant, at the time the judgment was rendered against him is a good defense to an action on such judgment in another state, the question depends upon the status of the judgment in the state of its rendition. Its validity must be tested by the laws of that state. If the coverture, infancy, or insanity is regarded, in the state where the judgment is rendered, as making the judgment absolutely void, that invalidity may undoubtedly be shown against it in any other jurisdiction. If, on the other hand, the ren-

dition of a judgment against such a person is regarded, in the state where it is given, as a mere irregularity or error in fact, having no greater effect than to make the judgment voidable on a proper direct proceeding for that purpose, then it will not be a good defense to an action on the judgment in another state. This rule is illustrated by a case ruled in Iowa. * * * The defendant answered that the judgment was void because rendered while he was a minor. * * * The chief justice said: 'If there was error in fact in permitting defendant to appear by attorney when a minor, it was an irregularity, and, as such, no more affected the validity of the judgment than if it had been an error in law. In either case the error, whether of law or of fact, does not render a judgment void; but a party may have his remedy in the state where the judgment was rendered, either in the same or an appellate tribunal. The defense cannot prevail here; for, until set aside, the judgment would have full force and effect in Ohio, and is entitled to the same here. The error does not go to the jurisdiction of the court.'" And the theory that the debt of the married woman is void will not sustain this decision. It is void, it is true, in West Virginia, in a court of law, and only there; for it is a valid debt in equity, binding her separate estate. The money garnished for it was separate estate, and bound for this debt, under our own law. A court of equity would, in this state, make it liable therefor. A justice in Ohio exercises law and equity jurisdiction, and his judgment binds that estate for this debt as a decree in equity would here. Do not think that I assert that the personal judgment against Mrs. Stewart in Ohio binds her. I mean that it binds her as to the debt, so as to protect the garnishee from second payment. I do not mean that it would further bind her.

I would much prefer that the Court should give, as the reason for its decision, the reason given in *Pierce v. Railway Co.*, 36 Wis. 288, and *Morgan v. Neville*, 74 Pa. St. 52,—that garnishee, to be protected, must notify his creditor,—than to place the decision on the untenable ground it does; though, with *Thomp. Homest. & Ex. s. 864*, I do not think notice necessary, as I have not found it suggested in other cases. Publication, as dictated by the law of Ohio,

is legal warning. Nor did the company have to plead that by the law of West Virginia the contract was void. No evidence shows that it knew she was a married woman. In its widespread business, why require it to inquire? If the state seize the debt in its hands, shall it go further? Shall not Mrs. Stewart bow to the majesty of the public, which makes that seizure valid? Shall she assume to question the power of the republic, though she suffer from it, if she could suffer in paying a just debt for groceries, making her life and the lives of those dear to her to subsist? *Id.* ss. 864, 866, shows this to be an unreasonable requirement. Nebraska and Wisconsin require that a garnishee shall plead that the debtor has a right to the garnished debt as an exemption, but other authorities deny it. *Moore v. Railroad Co.*, 43 Iowa, 385; *Jones v. Tracy*, 75 Pa. St. 417; *Conley v. Chilcote*, 25 Ohio St. 320; *Railroad Co. v. May*, *Id.* 347. I hold that this State, through this Court, should give to the defendant the protection which the constitution of the republic designed to give to all citizens alike. No mere sympathy should defeat this behest of the highest municipal law.

NOTE BY DENT, JUDGE:

The assurance company doing business in the State of West Virginia must be presumed to know the laws thereof, and, having insured the separate property of Mary A. Stewart, a married woman, must be presumed, after the custom of insurance companies, to know that she was a married woman, and what were all her rights and liabilities with regard to said property under the laws of said state, and therefore must be presumed to have known that her separate property was not subject to her husband's control, nor liable for the payment of his debts; and, being under his coverture, she was entitled to be supported by him, and that any simple contract debt made in relation to such support was void as to her, and binding on her husband alone, and could not in any wise affect her separate property, as the laws of West Virginia then stood. Porter & Co., being residents of the State of West Virginia, must also be presumed to be fully cognizant of these matters, and that their alleged claim was no debt against Mrs. Stewart, but binding on her husband alone. Knowing this, they seek a remote foreign tribunal, and upon a false and fraudulent affidavit, for they knew they had no debt which was enforceable against the separate estate of Mrs. Stewart; they invoke its aid to secretly seize and wrongfully appropriate her property, without her knowledge. She is given no notice of these proceedings, as such would be

fatal to them, but publication is made in a local paper, which she has no chance of seeing; and thus her separate property is fraudulently seized and appropriated without her knowledge, and her debtor, the garnishee, presumably with full knowledge of her rights and the fraudulent purpose of the plaintiffs, Porter & Co., and with its agencies in the State of West Virginia, makes no effort to defend the action, as it had the right to do, or to notify her thereof, that she might interpose her defense. Why did the garnishee thus remain silent? There can be but one answer, and that is that it was colluding with Porter & Co. to unlawfully apply Mrs. Stewart's separate estate on a debt for which it was not liable, and thus perpetrate a fraud upon her without her knowledge. The justice was not to blame in the matter, for he was imposed upon by the fraudulent conduct of the plaintiff, aided and abetted by the silence of the garnishee. The "constitution and majesty of the great republic" was never intended to be a cover for such fraudulent practices, and permit persons, by collusion, to wrongfully appropriate the property of another by deceit and stealth. This judgment against the garnishee, under the circumstances, should be regarded as though procured by itself. *Smith v. Dickson*, 58 Iowa, 444, (10 N. W. 850). The suppression of the truth oftentimes operates to perpetrate a fraud as completely as the utterance of a falsehood, and no one should be permitted to take advantage of a wrong in which he participates. The garnishee had the plaintiff's separate property, and it was in duty bound to defend it from the wrongful appropriation of others to debts to which it was exempt, or notify her of such wrongful attempt. Having failed to do either, it is no more than right that it should bear a loss incurred, to say the least, by its own indifference. Of two innocent parties, the one whose negligence occasioned the loss should bear the burden thereof. I concur in JUDGE MCWHORTER's opinion, for the foregoing reasons.

Affirmed.

CHARLESTON.

DENT v. BOARD OF COMMISSIONERS OF TAYLOR COUNTY.

(ENGLISH, JUDGE, *dissenting*.)(DENT, JUDGE, *absent*.)

Submitted December 31, 1898—Decided December 31, 1898.

1. MANDAMUS—*Election Canvasser—Recount—Certificates of Election.*

A *mandamus* will not issue to compel an election canvasser to assent to and certify the result of a recount of ballots as found by another canvasser, though both were present at it, if they disagree as to such result, and the unwilling one says it is not an adequate, correct, true recount. (By two judges.) (p. 756).

2. ELECTIONS BY THE PEOPLE—*Certificates of Election—Evidence—Ballots.*

Certificates of the result of an election made by the commissioner at the precincts are *prima facie* evidence of such result. The ballots, if identified as the same cast, are primary and higher evidence; but, in order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with. If there has been an opportunity for tampering with ballots, they lose their character as primary evidence. McCrary Elect. s. 443. (By two judges.) (p. 757.)

3. ELECTIONS BY THE PEOPLE—*Ballots—Evidence—Certificates of Election.*

If there is evidence tending to show that ballots are not sealed up after being counted by the precinct election officers, the ballots, on recount, are not the best evidence, but the result will be governed by the precinct certificates, where the certificates and the recount differ in result. (By two judges.) (p. 758).

45	750
49	745

45	750
53	291

45	750
e56	12
157	86
e57	87

45	750
e 60	69
60	73

4. MANDAMUS.

A *mandamus* cannot be brought against an officer in his official capacity after his term of office has ended. 13 Enc. Pl. & Prac. 661. (By two judges) (p. 759).

Application by W. R. D. Dent for a writ of *mandamus* to the board of commissioners of Taylor county.

Dismissed.

A. N. CAMPBELL and JOHN H. HOLT, for petitioner.

JOHN W. MASON, GEORGE W. MCCLINTIC, JOSEPH GAINES, and EDGAR P. RUCKER, for respondent.

BRANNON, PRESIDENT :

William R. D. Dent and Humphrey F. Brohard were competing candidates at the election in November, 1898, to represent Taylor County in the House of Delegates. The board of canvassers found upon the returns of the officers of election at the various precincts that Brohard received one thousand six hundred and seven votes and Dent one thousand five hundred and twenty-six votes, electing Brohard by eighty-one majority. Dent demanding a recount, a recount claimed by Dent as complete showed that Dent received one thousand five hundred and fifty-eight votes, and Brohard one thousand five hundred and twenty-one votes, giving Dent a majority of thirty-seven. There being a vacancy in the membership of the county court, the canvassing board was composed of two commissioners, W. J. Curry and J. K. Means. Curry signed a statement and declaration upon the book called "Election Record" that Dent was elected, and he signed and delivered to Dent also a certificate of his election. Means did not sign said entry on the election record, but refused to do so, and refused to sign Dent's certificate of election, and on the contrary, caused to be entered of record in the office of the county court—if that be material—a declaration that Dent received one thousand five hundred and twenty-six votes and Brohard one thousand six hundred and seven, as shown by certificates of the precinct officers; and that he declined to unite with Curry in declaring such result as Curry found by such recount, as he was not satisfied that such result was correct; and Means issued and delivered a certificate

of Brohard's election. Dent asks of this Court a *mandamus* to compel said Curry and Means, as composing said board of canvassers, to declare the result as ascertained by said recount, and to sign certificates thereof, and transmit one to William M. O. Dawson, Secretary of State, and one to each of said candidates. An alternative *mandamus* having been awarded, Means filed a return and Brohard has intervened, and filed a return to said alternative writ, and plaintiff, Dent, has demurred thereto.

I remark that Dent's petition does not seek a *mandamus* to review the action of the canvassers for error in counting ballots, and to have this Court recount ballots and declare the result, and thus the case does not seem to me to raise the very grave question which would then arise, as to the jurisdiction of the judiciary to count ballots, and declare the result of an election for the House of Delegates, in view of the provision of the Constitution that each branch of the legislature shall be the judge of the election and returns of its members. The plaintiff's case is based solely on the theory that there has been a complete recount of ballots electing him, and that he is entitled to a declaration and certificate thereof by said canvassers to give him a *prima facie* title to the office. I think there are three reasons against awarding a peremptory *mandamus*. One reason is that there is no finished, legal recount, by which both commissioners found a final result, so as, in law, to call for the signature of both commissioners to the declaration and certificate. The statute says that when the canvassers canvass the returns, whether with or without a recount, they shall enter the result in the election record, and deliver certificates thereof. This record entry and certificate must, in the words of the act, be signed "by the board or a majority of them." This record entry has not been signed. It is urged that Means' return admits that there was a recount, showing Dent elected, and that upon it a *mandamus* should go. The return cannot receive such construction, taken as a whole. That return does say that the canvassers opened the packages of ballots after they had been sealed up upon the first count, and that they were read by Curry, and the tally kept by the clerk, and that according to the report of the clerk, Dent

received one thousand five hundred and fifty-eight votes and Brohard one thousand five hundred and twenty-one, but that Means did not agree with Curry as to the correctness of said recount, and that Means refused, and still refuses, to make a record of the same, and that thereupon Curry, of his own motion, in the absence and without the knowledge, consent, or concurrence of Means, made the record in the election record purporting to be the record of said recount; that Curry claimed that a true and complete recount had been made, and desired to record it, but that he (Means) was of opinion that a full and complete recount had not been made, and he refused, for that reason, to record the same. Said return says: That the recount began at 9 o'clock A. M., of November 15th, and continued until 3 o'clock next morning, with the exception of one hour for dinner and one hour for supper; and that the board handled and considered over three thousand one hundred and twenty-nine ballots, all being considered as to three offices, and a portion as to four. Two hours were consumed by counsel in argument and other matters incident to the work. That the inspection and count were hurriedly made, and under such circumstances that he (Means) was not and is not certain of the accuracy of the recount. That he was not well, and during the greater part of the recount was physically exhausted. That said Means found that said recount showed in one precinct a change greater than one vote in four from the result as determined by the commissioners of election at that precinct, and very great changes at other precincts. That he believed and says that a more careful inspection of the ballots will determine their genuineness and the correctness of the canvassers in reading them, and of the clerk in reporting the count, and was necessary to determine accurately, and do justice to the parties. That for these reasons he did not believe that an adequate, full and just recount had been made; and that such recount had not been made; and that said recount should not be recorded, and certificate issued, until an opportunity is given the canvassers to require the attendance of the commissioners, poll clerks, and others present at said election to testify respecting the same, and especially to ascertain the

genuineness of the ballots; and that no such opportunity had been given, and no such witness had been examined touching such questions. That the ballots at precinct No. 5, Grafton district, were not sealed by the commissioners as required by law, nor the names of the commissioners written upon the envelope containing them, as required by law, but that they were only partially inclosed in a torn envelope, not sealed, but only tied about with common twine, and neither sealed nor signed by the commissioners. That no sufficient and proper inspection or recount of the ballots at that precinct, and others cast in said election, was had. The return further says that: "Immediately after said Curry had the record of said partial recount, made as aforesaid, entered upon the record book, he, the said Curry, absented himself from Taylor County, left the State, and remained absent for more than a month, and until the day respondent's successor entered into office in the place of respondent; that during this time respondent was unable to make a full and complete canvass as to said recount, for the reason that he and said Curry composed the said board, and, in the absence of said Curry, no quorum could be secured; that during all this time, up to his retirement from office on December 19, 1898, when his successor went into office, respondent was exceedingly anxious to complete said canvass, and ascertain and declare the true result of said election." Said return further states that at the time of making said "partial recount he became convinced that a more careful examination of said ballots should be had for the purpose of determining their genuineness" Brohard alleges that he and his counsel were refused an inspection of the ballots on said recount.

I have stated enough of the contents of Mean's return to show that it cannot be construed as admitting, but must be construed as denying, that a recount, finished and completed, existed, so as to warrant a *mandamus* to compel Means to approve it, and sign a certificate thereof. If the application were to compel the commissioners to reconvene and recount, that would present another question; but here it is claimed that there was a perfect recount, and that it only remains to execute it. In no sense can we re-

gard this recount as so completed. One canvasser says that it is correct, and satisfies his judgment and conscience; the other says it is not correct, and does not satisfy his judgment and conscience. Shall he be compelled to give an assent under such circumstances? It may be asked, shall a canvasser be allowed to withhold a certificate of election by merely saying that he is not satisfied with the result of a recount? If it clearly appeared to the Court that he was wrong in so refusing, the Court would compel him to accede; but we have no ballots before us, if we lawfully could have for this office, and we cannot say that Means is willfully acting against his duty under oath when he tells us under oath that his judgment and conscience were not satisfied, and he was present in the county, ready to make further canvass and inspection of the ballots. I know that the duty of canvassers is, as to the general function of making a canvass, ministerial; but within the pale of that action their action is in some respect *quasi* judicial, calling upon them to exercise judgment and discretion. Thus they act judicially in determining that the ballots, poll books, and certificates of the election returns are genuine or altered. *Brazie v. Commissioners*, 25 W. Va. 213. I have no hesitation in saying that if a canvasser, before he signs a result, becomes dissatisfied, and desires a review and re-examination and recount of the ballots, he has a right to have it. He has a discretion in making up his mind. Though a candidate has no right to a second recount, surely a member of the board has, in order to finally make up his mind. When his return states that upon a recount it does not find the true result, and that he did not assent to it, it seems to me that ends it; and he will no more be compelled to sign than would a judge be compelled to sign a bill of exceptions by *mandamus* when he says that it does not truly state the facts. I repeat that if we had the ballots before us, and could see that Means was corrupt, or partisan, or arbitrary in refusing his assent, we might, perhaps, compel him to give his assent; but, without such ballots, how can we say whether his hesitation is proper or improper? How can we say that his discretion has not been properly exercised? How can we deny him the exercise of judgment and discretion of a pub-

lic officer under oath? If we follow JUDGE ENGLISH in *Marcum v. Commissioners*, 42 W. Va. 273, (26 S. E. 281), we must refuse the *mandamus* in this case. He stated that the writ does not lie to compel the exercise of discretion by an inferior tribunal in a particular way; that, while it will be compelled to act in some way in the matter (that is, compelled to action), yet it will not be compelled to act in a particular way, where that manner involves the right to exercise discretion,—compelled to act, but not directed how to act. He said that, as the ballot commissioners of Putnam County had acted by putting one candidate on the ballots, yet they could not be compelled to put a different candidate on, though he was the legal nominee of the party. Apply JUDGE ENGLISH's doctrine in this case. Both canvassers, Curry and Means, did act, one in one way, the other in another; one received the ballots as telling the result, the other received the precinct returns as evidence of the result; one declared Dent elected, the other declared Brohard elected. It is now proposed to make Means declare Dent elected; that is to exercise his discretion and judgment in a particular way, contrary to the principles stated by JUDGE ENGLISH. Those principles are sustained by law, as a general proposition. In that case the majority of the Court held that under chapter 25, Acts 1893, *mandamus* could be used with the same effect as *certiorari* in reviewing action of officers under the election laws, and that the writ had wider scope therein than under the common law as expounded by JUDGE ENGLISH. And so I say now, in matters of election, when *mandamus* is used to review the action of election officers, and to reverse them for error, it is efficacious even in matters where those officers are vested with discretion; but that is because of that statute, and is not at common law. But note that this *mandamus* does not seek to review the work of these canvassers, does not bring before us the ballots, that we may see whether the action of one or the other canvasser is right. On the contrary, it assumes the recount as made, and asks us to compel Means to approve it when he disapproves it, and his action and judgment were contrary to it; thus asking us to compel his discretion in a certain direction. The case thus falls, not under that statute, but under the common law

as laid down by JUDGE ENGLISH. In declaring the result on the mere certificates from the precincts, canvassers act purely ministerially, and, but for the statute allowing a recount, they could not go behind those certificates. McCrary Elect. s. 227. And upon a recount I have heard it suggested that the character of the function changes, and that the board becomes a court with judicial powers, having additional discretion, and bound to exercise judgment in some matters; for instance, to construe ballots, and say for whom they were cast, or whether the ballot is void or not. If this doctrine be true, the case is clearer against a *mandamus*. Whether still canvassers or not, a mere ministerial body or not, their action involves discretion beyond what it does when acting only on precinct certificates. I conclude, therefore, that, in the absence of a complete recount, joined in by both commissioners as final, a *mandamus* cannot issue.

I now give another reason against awarding a *mandamus*. It is undisputed that at two precincts, casting hundreds of votes, the ballots were not sealed up in closed envelopes, with the names of the commissioners written across the seal. When the commissioners went to put the ballots in the envelopes, the envelopes were torn half way down or more, so that they could not be sealed, and so that the officers could not write their names upon them, and were merely closed with twine strings tied about them, and thus transmitted by the hands of individuals to the clerk's office, where they remained in the ballot boxes for for some days, until the canvassers met. Now, I disclaim utterly any imputation upon anybody of tampering with or altering these ballots. But this I state as a legal proposition; that, as evidence before that board of canvassers, the certificates made at the precincts were *prima facie* evidence of the result, and good until shown to be wrong. These certificates are made in the presence of numerous election officers of different parties eyeing the count, and that with scarcely any motive for wrong, and they are likely to tell the truth. The burden is on him who denies their truth to show that they are wrong. 6 Am. & Eng. Enc. Law. 335; McCrary, Elect. s. 445; Cooley, Const. Lim. 788. The ballots themselves are the highest evidence of

the result, when their identity as cast is established. *McCrary, Elect. s. 443; Hartman v. Young, (Or.) 20 Pac. 17.* But, if those ballots have not been preserved with the scrupulous care and in the manner directed by law, they lose their force as evidence of the result, and do not overthrow the precinct returns. "Where the ballots are preserved properly, so that they may be recounted by the order of court, they will govern, when there is a difference between them and the returns. But this should never be allowed unless the recount is made under such circumstances that it will be presumed to be more accurate than the official count, or where the ballots have been so kept that there is no danger that they have been tampered with." 6 Am. & Eng. Enc. Law, 335. "If there is evidence tending to show that the ballots are not sealed up after being counted by the board of canvassers, * * * the ballots, on a recount by the board of supervisors, are not the best evidence, but the court may adopt the result arrived at by the board of canvassers." *People v. Burden, 45 Cal. 241.* "If they have not been kept or protected with that zealous care which the statute contemplates, or so as to preclude opportunity for intermeddling with them, they are the weakest and most unreliable evidence." *Hartman v. Young, supra.* "If the ballots have not been kept as required by law, and surrounded by such security as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all." *Cooley, Const. Lim. 625.* This doctrine is abundantly supported. *Hartman v. Young, supra; Quinn v. Lattimore, 120 N. C. 426, (26 S. E. 638); Andrews v. Probate Judge, 74 Mich. 278; (41 N. W. 923); McCrary Elect. s. 443, citing Hudson v. Solomon, 19 Kan. 177; Martin v. Miles, 40 Neb. 135, (58 N. W. 732).* *Paine, Elect. s. 776,* says that, "before courts or legislative bodies should receive the result of recounts, there must be absolute proof that the ballots have been safely kept, and that they are the identical ones used at the election," and that not until this is proved beyond all reasonable doubt can force be given to the recount. JUDGE ENGLISH, in an opinion concurred in by JUDGE DENT, in a case where there was no whisper that the ballots were not the true ones

cast, held that when they were not sealed up they could not be counted. *Snodgrass v. Wetzel Co. Ct.*, (29 S. E. 1036); 44 W. Va., 56. He said that the law did not intend that even the clerk should have access to ballots required by law to be returned in a sealed package, properly endorsed, until such package was opened by the canvassers. But there was the precinct certificate, showing the same result as the ballots, while here they differ. The certificates prevail. I do not mean to say that there was any wrong touching these ballots, though the returns charge it. It was only a question before the board as to the force of two instruments of evidence, one being the ballots, the other the precinct returns; and I am bound to hold, under the principles just stated, and that the precinct returns prevail in law over the ballots, and, instead of entitling Dent to the certificate, would give it to Brohard. Then how can we compel Means to declare Dent elected upon the strength of the recount that was made, thus giving superior weight to the ballots over the certificates?

There is another reason against the award of a *mandamus*. When the petition for it was presented, Means had ceased to be a commissioner of the county court by expiration of his term. "A writ of *mandamus* cannot be brought against an officer in his official capacity after his term of office has ended." 13 Enc. Pl. & Prac. 661; High, Extr. Rem. s. 441; *Stock Co. v. Smith*, 165 U. S. 28, (17 Sup. Ct. 225.) If there was a completed recount, as spread upon the record and signed by Curry, the *mandamus* should have been against the commissioners in office at its date, as the county commissioners are a continuous body, and nothing remained but to sign the result of the recount, if it had been in fact complete, as it in fact was not, under the circumstances developed in this case. *Alderson v. Commissioners*, 32 W. Va. 454, (9 S. E. 863.) JUDGE MCWHORTER concurs herein. The alternative *mandamus* is dismissed.

ENGLISH, JUDGE (*dissenting*):

At the late election, W. R. D. Dent and Humphrey F. Brohard were opposing candidates for the House of Delegates from the county of Taylor. At the time the returns of said election came in, W. J. Curry and J. K. Means were

the only commissioners of the county court of said county, and as such were *ex officio* the board of canvassers, whose duty it was to canvass the returns of said election. In pursuance of the duty imposed upon them by statute, they proceeded to count the vote, and entered the same upon their record, and ascertained that at said election said Dent received one thousand five hundred and twenty-six votes and said Brohard received one thousand six hundred and seven votes for said office, the majority in favor of said Brohard being eighty-one votes; and thereupon said W. R. D. Dent demanded a recount of the ballots returned, which was proceeded with in the presence of counsel for the respective parties and various witnesses, and resulted in ascertaining that said Dent received one thousand five hundred and fifty-eight votes and said Brohard one thousand five hundred and twenty-one votes, finding the majority in favor of Dent to be thirty-seven. When the recount was completed, J. K. Means left the room where the recount was carried on, and W. J. Curry proceeded to record the result on the election record, as required by statute, and sign the same, and also signed a separate certificate of the result of the election in said county for each of the offices to be filled, including the House of Delegates. Said J. K. Means did not return to the place where said recount was made, and subsequently declined to sign the record of the result which had been signed by said Curry. Subsequently said Means claimed that he was not satisfied with the result of said recount, refused to sign the certificate of the result entered on the election record by said Curry, and caused to be entered on said election record a declaration that said Dent received one thousand five hundred and twenty-six votes and Brohard one thousand six hundred and seven, as shown by the certificate of the returns from the various precincts, and signed a certificate of said Brohard's election to said office; thus utterly ignoring and disregarding the result ascertained by the recount demanded by Dent. Thereupon said Dent applied to a judge of this Court for a *mandamus nisi* to compel said commissioners Curry and Means to declare the result as ascertained by said recount, and to sign certificates thereof, and dispose of them as required by statute. A *mandamus nisi* having been awarded,

said Means and Brohard filed returns to said writ, and said Dent demurred thereto. On the 31st day of December, 1898, the case was heard, and the above opinion handed down, in which I cannot concur, for the following reasons:

First. When the legislature, in section 68, of chapter 3 of the Code, provided that "after canvassing the returns of the election, the board should upon the demand of any candidate voted for at such election, open and examine any one or more of the sealed packages of ballots and recount the same," and that "when they had made their certificates and declared the result as thereafter provided, stating what shall be done with the sealed packages, poll books," etc., and further provided that, "if the result of the election was not changed by such recount the costs and expenses should be paid by the party at whose instance the same was made," it never intended that a member of the canvassing board should, after a recount was demanded and made, utterly ignore the result of such recount, and enter on the election record the result ascertained from the returns of the precinct officers before the recount was demanded. Who would demand a recount and incur the risk of paying the costs of the same, if a member of the board could disregard the result, and excuse himself by saying he was not satisfied therewith? While it is true that one of the envelopes or paper sacks in which the ballots were returned from the voting precinct to the clerk's office was ripped in putting the ballots in it, and it was not properly sealed and indorsed, yet the sack was tied up with twine, and placed in the ballot box, and in this way brought to the clerk's office, and the ballots so returned were counted by the board of canvassers, and the number of votes cast for W. R. D. Dent and the number cast for H. F. Brohard were ascertained; and after the recount had been demanded by Dent, and the votes recounted in presence of J. K. Means, the defendant so far as appears without objection on his part, on the 17th day of December, 1898, said J. K. Means went into the clerk's office of Taylor county court, and made an entry upon the election record that he, as a member of the board of canvassers of Taylor County, charged with the duty of canvassing, ascertaining, and declaring the result of the election held in said county on the 8th day

of November, 1898, said that he declined to join with his associate, W. J. Curry, in certifying the result of said election as recorded by said Curry alone on the 14th, 15th, and 16th of November, 1898, purporting to be the result of said election, for the reason that he (said Means) was not satisfied that the result as above declared was correct. He, however, proceeds to state that he concurs with the recount, except as to the record for the office of House of Delegates and county commissioner for the four-year term, then proceeds to declare the true result to be as ascertained on counting the ballots returned by the precinct commissioners, and proceeded to issue a certificate in accordance with the result ascertained before the recount was demanded, certifying that he had carefully and impartially examined the returns of said election. It thus appears that the ballots were not in such bad condition as to prevent this officer from making a careful and impartial examination when they were first returned to the clerk's office, and nothing appears to have prevented the same careful and impartial examination on the recount, and yet Commissioner Means was not satisfied, nor does it appear that he asked to make any further examination of the ballots. We come now to the inquiry whether the duties of this commissioner with reference to counting and recounting the vote were such as he could not be compelled to perform by *mandamus*. We find the law thus stated in 13 Enc. Pl. & Prac. p. 520: "While the writ of *mandamus* lies in many cases to courts and judicial officers to compel them to perform certain acts, or to take action in various classes of cases, in no case will the writ issue to control the exercise of discretion vested in such court or officers;" and on page 528 of same volume it is said: "When the writ of *mandamus* issues to ministerial officers, though they constitute part of the machinery of the courts, or to judicial officers to command acts which are ministerial, and involve no exercise of discretion, the writ may control such officers, and not only command them to perform the acts in question, but direct the manner of such performance and the decision which they are to render,"—citing numerous authorities. McCrary on Elections (page 198, s. 261), on this question, says: "It is well settled that the duties of

canvassing officers are purely ministerial, and extend only to the casting up of the votes, and awarding the certificate to the person having the highest number. They have no judicial power,"—citing many authorities. The same author (p. 290, s. 385) says: "The courts will not undertake to decide upon the right of a party to hold a seat in the legislature, where, by the constitution, each house is made the judge of the election and qualification of its own members; but a court may, by *mandamus*, compel the proper certifying officers to discharge their duties, and arm the parties elected to such legislative body with the credentials necessary to enable them to assert their rights before the proper tribunal." In the case of *Brazie v. Commissioners*, 25 W. Va. 220, SNYDER, JUDGE, delivering the opinion of this Court, says: "The authorities uniformly agree that the precinct commissioners act judicially in passing upon the right of persons to vote. The county commissioners, then, as a mere ministerial body, have no power to review this judicial action, because to do so they must of necessity act judicially," etc. Again, on page 222, he says: "All the acts which the commissioners can do under the statute must be based upon the returns. Their final act and determination must be such as appears from and is shown by the returns from the several voting places of the county to be correct. * * * They are authorized to enter no judgment, and their power is limited by the express words of the statute which gives them being to the signing of a certificate containing the whole number of votes received by each person for each office, and therein declaring the result, after having carefully and impartially examined the returns of the election. This certificate, thus signed, is not a judicial judgment, * * * but is a declaration of a conclusion limited and restricted by the letter of the statute." In the case of *Lewis v. Commissioners*, 16 Kan. 107, Brewer, J., delivering the opinion of the court, said: "The view taken by the Iowa court seems to us the correct one. It is the duty of the canvassers to canvass all the returns, and they as truly fail to discharge this duty by canvassing only a part of the returns, and refusing to canvass the others, as by refusing to canvass any; and it is settled by abundant authority that where

the board refuses to canvass any of the votes it may be compelled to do so by *mandamus*, and this though the board has adjourned *sine die*,"—citing *Hugerty v. Arnold*, 13 Kan. 367, as a case in point. "The canvass is a ministerial act, and part performance is no more a discharge of the duty enjoined than no performance. The adjournment of the board does not deprive the court of the power to compel it to act, any more than the adjournment of a term of the district court would prevent this court from compelling by *mandamus* the signing of a bill of exceptions by the judge of that court, which had been tendered to him before the adjournment. * * * As a general rule, when a duty is at the proper time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed, and is not destroyed by the lapse of the time within which, in the first place, the duty ought to have been done."

Now, applying this ruling to the case under consideration, it appears that W. R. D. Dent demanded a recount of the votes, which was proceeded with, both commissioners being present; Curry, one of the commissioners reading the ballots, and the clerk recording them, until all the ballots were thus canvassed, and the vote recorded. It does not appear that Means objected at the time to the mode of ascertaining the result, or to the conduct of either of the parties engaged in making the recount, nor does it appear that he asked that the ballots from any of the precincts should be recanvassed. Curry remained until the record was made up by the clerk, and signed the same, and made out the certificates. Means, in his return, says that he refused to make a record of said recount, but does not state when he so refused, and to whom he gave notice of such refusal. Said Means, in his return, also says "that immediately after said Curry had the record of said partial recount, made as aforesaid, entered upon the record book in the clerk's office of the said county, he absented himself from Taylor County." But the record shows that Curry signed the proceedings of the 15th of November, including said record, and that on the 16th both Means and Curry were present, and Brohard and Armstrong tendered bills of exceptions; but the record nowhere shows that Means

objected to the recount, or assigned any reason for not signing the declaration of the result, although Curry was present the day after he had signed it, and did not immediately absent himself, as the return states, as he signed the adjourning order on the 16th. Again, it is claimed that Means went out of office, and for that reason he could not be compelled to sign the declaration of the result of the recount. He does not appear to have been out of office on the 17th of December, 1898, when he proceeded to declare the result without reference to the recount, simply stating that he was not satisfied therewith, and issued a certificate of the result, found, as he says, by carefully and impartially examining the returns of the election. Now, as it appears to me that all that remained to be done by J. K. Means was to sign his name, this would have completed the recount, and certified the result. He says, in his return, that he suspected frauds, but he does not point them out; neither did he at the proper time ask an opportunity to do so. He simply absented himself, and declined to add his signature to the record, which was a personal duty imposed upon him by the statute. If a commissioner can, by saying he is not satisfied with the result, and resigning, prevent the result of an election from being declared, few candidates would receive certificates where the commissioners are of different politics. That this was a personal duty is apparent from the fact that his successor would know nothing about the proceedings in counting the vote, and, of course, could not certify.

In the case of *State v. Shearer*, 29 Neb. 477, (45 N. W. 784,) it was held that: "It is the duty of the county clerk to report all the fees of his office, and pay the excess over the amount to which he is entitled into the county treasury. This duty is personal to himself, and in case of his failure to perform his duty in that regard a *mandamus* may be issued, even after the expiration of his term of office, to compel the performance of such duty." Now, the duties required by statute of this board of canvassers in making the returns of the fact as to the result of elections is not entirely dissimilar to the duties required of a sheriff. Under the statute, he is required to return the time and manner of serving process, and to subscribe his name to

such return. The canvassers are required to ascertain the result of the election by counting the ballots, and, when ascertained, they are to certify the result; but the performance of such duty on the part of the sheriff is not limited to his term of office, as will be seen by reference to the case of *Shenandoah Val. R. Co. v. Ashby's Trustees*, 86 Va. 232, (9 S. E. 1003), in which case a sheriff was allowed to amend his return, thirteen years after judgment by default, to show that service was on a director of the defendant corporation in the county wherein he resided. Lewis, P., in delivering the opinion of the court, said: "And it makes no difference that the officer by whom the return was made has gone out of office, there being no specific limitation of the time within which the power may be exercised,"—which case is cited with approval by BRANNON, JUDGE, in the case of *Hopkins v. Railroad Co.*, 42 W. Va. 537, (26 S. E. 187). This recount was demanded by Dent at the proper time, and, as it seems to me, was improperly refused on the part of the defendant Means, and in my opinion the return filed by him in this case furnishes no sufficient excuse for his failure to perform the duties required of him by statute. I would, for these reasons, be in favor of awarding the *mandamus*.

Dismissed.

JANUARY TERM, 1899.

CHARLESTON.

STATE v. HULL.

(DENT, PRESIDENT AND BRANNON, JUDGE, *concurring*.)

Submitted November 30, 1898—Decided January 14, 1899.

1. EVIDENCE—*Incompetent Evidence--Criminal Law--Reversal.*

Where illegal evidence is admitted against the objection of a party, it will be presumed that it prejudices such party; and if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for the reversal of the judgment; but, if it clearly appear that it could not have changed the result if it had been excluded, it will not be cause for reversing the judgment. (p. 777).

2. EVIDENCE--*Expert Testimony--Rape--Criminal Law.*

A medical witness who is examined as an expert in the trial of an indictment for rape, after stating that he had been called upon to examine the prosecutrix, and the result of his examination, will not be allowed to express the opinion to the jury that no girl would have voluntarily submitted to the suffering necessary to have brought about this result. (p. 774).

3. EVIDENCE—*Expert Testimony—Opinion Evidence—Criminal Law.*

Where an injury relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible. (p. 774).

4. EVIDENCE--*Expert Testimony—Opinion Evidence—Criminal Law.*

While the admission in evidence of the opinions of experts necessarily give rise to very nice distinctions between facts and

45	767
140	444
45	701
58	45

findings, it nevertheless does not annul the rule of law, axiomatic with reference to them, as well as to all witnesses, that they must not be so examined as to substitute their opinions for the verdict, and thus usurp the peculiar province of the jury. (p. 776).

Error to Circuit Court, Berkeley County.

Grant Hull was convicted of crime, and brings error.

Reversed.

FLICK, WESTENHAVER & BAKER, for plaintiff in error.

EDGAR P. RUCKER, ATTORNEY GENERAL, S. G. PITZER and EDWIN M. KEATLEY, for the State.

ENGLISH, JUDGE :

On the 13th day of September, 1898, Grant Hull was indicted in the circuit court of Berkeley County, for the crime of rape, charged to have been committed upon one Ella May Glessner. The plea of not guilty was interposed, and on the 16th day of September, 1898, a jury was sworn in the cause. On the 17th of the same month they found the prisoner guilty as charged in the indictment, but recommended that he be punished by confinement in the penitentiary, and, thereupon, the prisoner moved the court to set aside the verdict and grant him a new trial, which motion, after consideration, was, on the 4th day of October following, overruled; to which action of the court the prisoner by his counsel excepted, and moved the court to set aside the evidence. Judgment was rendered upon the verdict, and the prisoner was sentenced to seven years' confinement in the penitentiary; and thereupon the prisoner applied for, and obtained, this writ of error. The errors relied on by the prisoner are as follows: (1) The circuit court should have set aside the verdict on the ground that the *corpus delicti* was not sufficiently proved. (2) The circuit court admitted improper testimony, against the objection of the defendant, materially prejudicial to the defense, and for this, on motion, should have set aside the verdict. (3) The circuit court should have set aside the verdict of the jury, and awarded the defendant a new trial, on the ground that the verdict was against the clear preponderance of the evidence.

Upon the question raised by the first assignment of error, as to whether the *corpus delicti* was sufficiently proved, the State necessarily relied upon the testimony of Ella May Glessner, who is discredited by her own story of the transaction; whose want of truthfulness appears to have been so notorious that her own mother would not believe her, as is shown by the letter written by her to Mrs. Hayes, in which, after speaking of the complaints her daughter had made against her, she says: "I want you to come immediately to see me. I want this talk stopped. I want the straight side of the story. * * * I want you to come right away, and tell me the straight thing of it. I know you will tell me the truth." The whole story of the alleged crime, as detailed by witnesses for the State, abound in inconsistencies and improbabilities. The girl who prefers this charge, and seeks to consign her stepfather to the gallows, or a long term of confinement in the penitentiary, out of spite, which appears to have been engendered by a letter written by her mother, exposing some of her falsehoods and fabrications in regard to the treatment she had received at the hands of the parties with whom she was making her home, begins her testimony with a statement which, although it may be immaterial, was regarded as important by her, which was that nobody started away from the prisoner's house with her; that the prisoner had gone away from the house to look at his potato patch,—he said he was going to look at it; she saw him go; was standing on the porch when he went out. On cross-examination she says: "I did not start with Grant. It was four o'clock when I started." She also says: "Grant asked Frank to go with him when he left. He said. 'No; I will go to the doctor's with you.' That was a half hour before I went to the house." This testimony is directly and plainly contradicted by several witnesses. First. Mrs. Mary Hull, the mother of the prisoner, testifies as follows: "I have made my home with the prisoner for several years. Was living there on Sunday, July 24th. It was twenty minutes past four o'clock when I came out of Mrs. Hull's room, and Ella left about four minutes after I came out. Grant and Ella went away together. He was a couple steps ahead." Mrs. Glessner also, in her testi-

mony, says: "I was at Hull's house on the Sunday in question, and Ella was there also. It was something after four o'clock when she left the house to return home. I was on the porch when she left. I didn't know who left first. Mr. Hull said, 'I will go a piece of the way with you,—as far as my potato patch.' She and he left together. I cannot say which was first." Frank Glessner, in his testimony, also says: "I was on the porch when they left [speaking of prisoner and Ella], and they went together." The only motive we can ascribe for this deliberated falsehood on the part of Ella is that she had accused the prisoner of making a similar assault upon her a year previous, and claimed to be afraid of prisoner on that account, and may have thought the story of former assault would be detracted from by her action in being too sociable and friendly with the prisoner. But, let the motive have been what it might, she stands flatly contradicted by three witnesses.

Following the testimony of this prosecuting witness, she says: "I met Grant the first time after leaving the house at Hedges' orchard, I went catty-cornered through the cornfield to the road, and Grant was in the road where it runs to the woods. The summer before this, Grant came down to Mrs. Hayes', and asked me if I could go up with him. He took me up through Ropp's woods, and tried to do the same thing. I hollered, and my mother came running up. He gave me a quarter, and I gave it to my mother." Now, when we turn to the testimony of Mrs. Grant Hull, she says: "I have heard the story of what Ella says happened a year before this occurrence. It is not true, nothing of the kind ever happened. I never heard anything of this kind." This witness says she told Mrs. Hayes about two months afterwards, but Mrs. Hayes, when on the witness stand, does not confirm her. Now, it is apparent that this story, which was brought out on cross-examination, was fabricated and detailed to account for the remarkable conduct on her part, which was described by her in detailing her evidence in chief. She says: "I met Grant near the end of Hedges' orchard. He was in the road. I shook hands with him, and give him good-bye, and asked him over. That was a field and a house distant from Grant's house. He said, 'All right'; he

might be over in a few weeks. He went on towards his home, and I went in the opposite direction." Now, after this friendly parting, the prisoner taking the road towards home, it is somewhat remarkable that in a few minutes afterwards he should be found pursuing her in McDowell's woods, and halting her in a threatening manner; telling her, if she did not halt he would kill her; and that she should take off her hat, and start to run fast. Would it not be more reasonable to suppose that if the prisoner had any such designs upon this girl, he would have walked along with her to McDowell's woods, instead of telling her good-bye, and starting on the road leading to his home? And even if he had pursued her, as she said he did, would he, after his recent friendly parting with the girl, have accosted her in the rude and threatening manner testified to by her? Such conduct would be not only unnatural, but foolish and unaccountable.

Coming next to the story this witness tells of what transpired in McDowell's woods, can you say it bears the impress of truth? She says: "He says, 'Come here!' and I says, 'No, sir.' I told him I must go home. And he walked up, and caught me by the arm, and says, 'Come up here in the woods; I have something pretty to show you.' And I says, 'No, sir.' And so he took me up in the woods, and done what he pleased. He caught hold of my dress sleeve, and pulled me along. I pulled and tore my dress sleeve. I hollered 'murder!' I jerked, and tried to get away from him, but he would not let me go. * * * He was about half an hour doing it. He just took and done what he pleased, and he tore all my underclothes." Now, that this story was neither true nor well considered is apparent when we recur to the fact that she left the house of prisoner at four o'clock and twenty-five minutes. Mr. John D. Smith, in his testimony, says: "We left Spring Mills about five o'clock in the evening. She [Ella May] met us about one hundred yards below the cross roads at Spring Mills. We had started without her, and she met us." From Grant Hull's to Spring Mills, according to the testimony of Hunter Harlan, is one mile and a half, and the witness Decatur Hedges calls it two miles. It is a matter of common observation that a person walk-

ing in an ordinary gait will not walk more than three miles an hour. If, then, we consider the distance from the prisoner's to Spring Mills to have been one mile and a half, it would have taken the witness half an hour to have walked it; and, if this be so, how can we reconcile it with her story that she was detained in McDowell's woods for half an hour with the prisoner, or that she was detained there at all? This witness not only states that she was detained in McDowell's woods by the prisoner for half an hour, but Mrs. Hayes states that she told her on Thursday that prisoner had taken her in the woods, and kept her there a half hour, and what he had done to her. This witness also stated that Ella's dress was torn under the arm, and her underclothes were not very clean,—they had blood on them. No other part of her clothing was torn, which is another flat contradiction of Ella's testimony. Again, can we reconcile the deportment of this girl after she meets with the Smiths near Spring Mills, and proceeds on her way home with them, with the alleged fact that she had just been subjected to one of the grossest outrages that can befall women? The witness John G. Smith testifies that: "On the return trip home she acted the same as usual. She acted foolish and giddy, like all young people do. She was always wild and full of fun. She didn't appear either tired or worried after we got in the boat."

The logical conclusion resulting from this train of circumstances is that, while it may be true that some time previous to the finding of this indictment Ella May Glessner may have been robbed of her priceless jewel, it was not on Sunday evening, July 24, 1898, on her way from the house of the prisoner to Spring Mills. If the subsequent conduct and actions of this girl were inconsistent with the charge contained in the indictment, what must we say of the testimony of a negro boy,—Peter Johns? In looking at this testimony, we must not only take into consideration what any sane man who had been guilty of such an offense would have said or done under like circumstances, but we must look at the character and reputation of the prisoner, as appears from the testimony of the Presbyterian minister and five others. They all testify as to his being an honest an upright man. Also the statement of

said Johns on cross-examination that, although he lived about a mile from prisoner's, they were only acquaintances. He had only been to prisoner's house once. That they did not run together. Taking this view of the circumstances and conditions of the parties, can we regard it as within the bounds of possibilities that the prisoner, if he had been guilty, would have stopped on the road, and made a voluntary statement to this young negro boy that he had gone a piece with a girl, and committed an outrage upon her chastity against her consent, or even with it? The prisoner was within a short distance of his home, where his wife and children were. He stood well in the community as an honest, respectable man, and it is natural to suppose that he valued the reputation he had earned among his neighbors; and it is taxing our credulity too far to believe that, even if he had so far forgotten himself as to have been guilty of such conduct, that he would have made a confidant of this strange negro boy, and imparted to him a secret which might cost him his life or his liberty.

We come next to the consideration of the testimony of Dr. D. R. Ross, who testified that he "had occasion to examine Ella May Glessner on the 31st day of August, 1898." He says: "My examination was to determine whether an assault had been made upon her person. I found evidence of recent cohabitation, and that she had been injured by it. The parts were still swollen and congested, and very tender. I found no other marks of violence. She was about a half-developed girl. The hymen was destroyed. That is all I know." On cross-examination he said: "There were no marks upon her except about her private parts. The indications were that several days,—three or four, at least—had elapsed since she received the injuries, as there was some sloughing. I could form no idea how long previously her virginity had been destroyed. It was evident that the injuries would not have happened to a person habitually accustomed to intercourse. The internal injuries would have been the same whether the intercourse was forced or by consent." On re-direct examination, and over the objection of the prisoner, this witness testified as follows: "I do not believe that any girl would have voluntarily submitted to the suffering necessary to have brought

about this result." Now, it is reasonable to suppose that the testimony of this physician, who had been called on to make the examination of this girl, would have great weight, and a controlling influence with the jury. The distinguishing feature of this heinous crime is that force should have been used in its commission. This medical witness had just stated that "the internal injuries would have been the same whether the intercourse was forced or by consent," and then, in response to a question propounded by the State, said, "I do not believe that any girl would have voluntarily submitted to the suffering necessary to have brought about this result." Did the circuit court err in allowing this answer to go to the jury over the objection of the prisoner? It required no science, or skill, or peculiar habits of study to reach the conclusion expressed in this opinion, after the facts were before them. Any man on the jury was as capable of arriving at a correct conclusion as this physician. In the case of *Welch v. Insurance Co.*, 23 W. Va. 305, GREEN, JUDGE, in delivering the opinion of the Court, says: "Of facts which require proof by indirect evidence, says Starkie: 'There are some of so peculiar a nature that juries cannot, without other aid, come to a direct conclusion on the subject. In such instances, where the inference requires the judgment of persons of peculiar skill and knowledge on the particular subject, the testimony of such as to their opinion and judgment upon the facts is admissible evidence to enable a jury to come to a correct conclusion.

* * * But Starkie lays it down further that when the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible; and he is unquestionably right in this position." We also find the law thus stated in Starkie, *Ev.* (9th Ed.) p. 755. "An expert cannot be asked to give his opinion upon doubtful facts in the case on trial which remain to be found by the jury. but a similar case may be hypothetically put to him, based upon the evidence in such case." This Court held in the case of *State v. Musgrave*, 43 W. Va. 673, (28 S. E. 814, syl. point 5): "The subject of all questions of experts should be to obtain their opinion as to matters of

skill or science which are in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts." Yet this medical witness was allowed to tell the jury that he did not believe any girl would have voluntarily submitted to the suffering necessary to have brought about this result (that is, the indications which he found). Did he not, by that answer, tell the jury that, in his opinion, the result was not accomplished with her consent, or—which is the same thing—was done by force; in other words, that a rape had been committed on this girl? If this prosecution was lacking in this important element, required to constitute rape, this witness was allowed to tell the jury that, in his opinion, the act was committed against her consent, and, consequently, by force.

Counsel for the prisoner cite the case of *Noonan v. State*, 55 Wis. 258, (12 N. W. 379), which, in point of facts, closely resembles the case under consideration, which is quoted from in the brief as follows: "A medical witness, called on behalf of the state, who made an examination of the prosecutrix several days after the rape was alleged to have been committed, testified that on such examination he found an aggravated inflammation of the uterus, vagina, and other sexual organs of the prosecutrix. He was then allowed, under objection by the plaintiff in error, to testify that, in his opinion, such inflammation was produced by her having connection (a violent, not a free, connection); that is in substance and effect, that the inflammation was the result of rape, which had been committed upon her. The testimony here quoted was given in answer to the questions put by judge: "To what do you attribute the inflamed condition that you say you found? And the question was duly objected to, and exception thereto taken. The question and the answer which it elicited were clearly incompetent. The witness was competent to state what effects might result from a rape, but it was going far beyond the range of authorized expert testimony to allow him to give an opinion that the inflammation he discovered was produced by rape. On the cross-examination this witness was constrained to admit—what any person of ordinary intelligence knows without the aid of expert testimony—

that there are other adequate causes which might have produced such inflammation. It was for the jury to determine whether the inflammation which the witness testified to was the result of rape or some other cause, and the extent to which expert testimony affected that question could properly be resorted to would be to show what effects upon the sexual organs of the female might result had she been ravished; but the testimony admitted was a usurpation of the province of the jury, and beyond all question, its admission was error,"—citing *Luning v. State*, 2 Pin. 285; *Knoll v. State*, 55 Wis. 249 (12 N. W. 369); *Cook v. State*, 24 N. J. Law, 843. In 7 Am. & Eng. Enc. Law, p. 500, it is said, "A physician may testify what effect rape would have upon the sexual organs, and that on examination he found them inflamed," and in note 1, "but not that, in his opinion, such inflammation was produced by having violent connection;" citing *Noonan v. State*, *supra*. In 8 Enc. Pl. & Prac., p. 751, we find the law thus stated: "While the admission in evidence of the opinions of experts necessarily gives arise to very nice distinctions between facts and findings, it nevertheless does not annul the rule of law, axiomatic with reference to them as well as to all witnesses, that they must not be so examined as to substitute their opinions for the verdict, and thus usurp the peculiar province of the jury," citing *Gunter v. State*, 83 Ala. 96, (3 South 600). In the same work (page 771), speaking of expert witnesses, it is said: "The rule that an expert cannot be asked his opinion as to the merits of the case on trial is equally as applicable to his re-examination as to his examination in chief." The medical witness in this case not only expressed his opinion upon the merits when he stated that he did not believe that the prosecutrix would have voluntarily submitted to the suffering necessary to have brought about the result, but he invaded the province of the jury.

Now, without attempting to recapitulate the testimony, my conclusion is that its character is not such as to establish the *corpus delicti*. Bearing in mind the language of Lord Hale, who, in speaking of rape, says: "It must be remembered that it is an accusation easily made, but difficult to be disproved by the party accused, be he ever so

innocent," (1 Hale, P. C. p. 635), and also the maxim that the prisoner must be presumed innocent until his guilt is proved by competent evidence, I cannot refrain from referring for a moment to the earnestness and zeal displayed by the attorney for the state in attempting to overthrow the effect of the character shown by the prisoner for honesty and morality by asserting that the newspapers are constantly heralding to the world the fall of men high in church work, who have embezzled the funds of institutions, or robbed their Sunday school scholars of their virtue, and seeking to establish the rule by referring to such monumental exceptions as the case of Pearl Bryan, of Cincinnati, and Durrant, of San Francisco, in both of which cases murder was committed to conceal the first crime. This attorney must have fully realized how important it was to his success in this prosecution to remove from his way the character which the prisoner had established by his minister and those that knew him best, and to bolster up the character of this innocent boy, who relates a story that bears on its face unreasonableness and improbability. The prosecutrix has sworn to enough in this case to establish the prisoner's guilt if she had spoken the truth; but she has been contradicted in so many particulars that, to say the least of it, extreme doubt has been cast upon her testimony; and, considering the whole evidence,—as we are required to do by statute,—my conclusion is that the court erred in overruling the motion to set aside the verdict.

I am also of opinion that the court erred in allowing said medical witness, after stating that the result would have been the same whether the intercourse was forced or by consent, to testify that he did not believe that any girl would have voluntarily submitted to the suffering necessary to have brought about this result. Was the prisoner prejudiced by this ruling? In *State v. Musgrave, supra* (Syl. point 9), this Court held that: "Where illegal evidence is admitted against the objection of a party, it will be presumed that it prejudiced such party; and if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for the reversal of the judgment, but, if it clearly appear that it could not have changed the

result if it had been excluded it will not be cause of reversing the judgment." But it does not appear, and we cannot say, that this evidence, if excluded, would not have changed the result. The opinions of this physician in a case of this character would necessarily have great weight with a jury, and we cannot say that this opinion, illegally and improperly expressed in the presence of the jury, did not prejudice the prisoner, or that it did not control the verdict. For these reasons the judgment complained of is reversed, the verdict set aside, and a new trial awarded.

BRANNON, JUDGE, (*concurring*):

I agree to the syllabus. I agree that a new trial be granted for the admission of improper evidence. But I do not agree to all that part of JUDGE ENGLISH's opinion holding the evidence of the State's witnesses unworthy of credit, and holding that the *corpus delicti* is not proven. I do not think we ought to pass on the evidence, and thus disparage and destroy the State's case in advance of a new trial. What is the use of a new trial with the State's evidence condemned in advance? My position is that that part of JUDGE ENGLISH's opinion sets a bad precedent for this Court. I hold that where this Court reverses for the admission or rejection of evidence, or for giving or refusal of instructions, or on any ground other than the weight or credit of evidence, we should not pass on the weight or credit of evidence, but remand the case for a new trial without influence from an opinion of this Court branding and condemning the evidence as not worthy of credit. The evidence may not be the same on another trial; other evidence may be brought in; and, if we brand the evidence, it necessarily discounts the effect of the old evidence. Need I cite cases to show that the jury is almost uncontrollably the judge of the credit of the witnesses? Yet JUDGE ENGLISH makes a jury out of this Court, and makes us brand witnesses as false whom twelve sworn jurors and a judge believed, when they saw the witnesses, and enjoyed great advantage in passing on their evidence, which we do not possess, which JUDGE ENGLISH said gave them better capacity to judge than we. *Sigler v. Beebe*, 44 W. Va. 592,

(30 S. E. 76). I do not say that where a party's case turns only on weight of evidence we are not bound to consider it. We are so bound. But when the party gets a new trial on other grounds, we ought not to pass on the evidence. Chapter 131, section 9, Code 1891, as construed in *Johnson v. Burns*, 39 W. Va. 658, (20 S. E. 686,) does not require us to do so where not necessary to give the party a new trial. And I am sure that act was not intended to utterly reverse the rule that made the jury peculiarly, and almost uncontrollably, the judge of the veracity of witnesses. If we do pass on the evidence, we must say it establishes the case. And why? Because the jury gave it credit, *Gilmer v. Sidenstricker*, 42 W. Va. 57, (24 S. E. 566); *Dudleys v. Dudleys*, 3 Leigh, 436, and because in *Akers v. De Witt*, 41 W. Va. 229, (23 S. E. 669,) it was held that, if the sole ground for new trial depends on credit of witnesses, this Court will not disturb the judgment. Are we to usurp the jury power? Is this great jury right from Magna Charta, imbedded in our bill of rights, to be frittered away? If this doctrine is carried out, how far will it depreciate, or at last undermine, this right which we have all considered sacred? The old rule of demurrer to evidence and motion for new trial preserved to the party the benefit of all his evidence conflicting with that of his opponent, and conceded credit to his witnesses; but, if we change this by denying credit to his witnesses, do we not deny him jury trial in effect? I do not think that act goes so far. If we so construe it, do we not make it unconstitutional? We must give it a construction not making it run counter to the Constitution if possible.

NOTE BY DENT, PRESIDENT:

I concur in the result reached in this case and the syllabus, but dissent from that portion of JUDGE ENGLISH'S opinion that passes on the credibility of the witnesses, as this is an invasion of the province of the jury. See *Akers v. De Witt*, 41 W. Va. 229, (23 S. E. 669).

Reversed.

CHARLESTON.

POWELL *et al.* v. DAWSON, Secretary of State.

Submitted Sept. 26, 1898—Decided Jan. 19, 1899.

1. CORPORATIONS—*Mandamus*—*Baptist Missionary Society*—*Charter*.

The secretary of state will not be compelled by *mandamus* to issue a charter of incorporation to several persons who agree to become a corporation by the name of the "Baptist Missionary Society of West Virginia," for the purpose of promoting religion by aiding in the support of Baptist ministers engaged in preaching the gospel, and by aiding in the erection of houses of worship on missionary fields in West Virginia, and by collecting and disbursing funds for these purposes. (p. 783.)

2. CORPORATIONS—*Incorporation of Church*—*Constitutional Law*.

Granting a certificate of incorporation upon the presentation of such an agreement would, in effect, be incorporating the church the parties represent, and contrary to the provisions of the Constitution and statute. (p. 784.)

Application by W. E. Powell and others for a writ of *mandamus* against W. M. O. Dawson, Secretary of State.

Writ Denied.

DAVID D. JOHNSON and MERRICK & SMITH, for petitioners.

EDGAR P. RUCKER, ATTORNEY GENERAL and EDWIN M. KEATLEY, for respondent.

ENGLISH, JUDGE:

On the 13th day of January, 1898, W. E. Powell and six others entered into a written agreement in the form prescribed by section 32 of chapter 54 of the Code, for the purpose of forming a corporation by the name of the "Baptist Missionary Society of West Virginia," for promoting religion by aiding in the support of Baptist ministers

engaged in preaching the gospel, and by aiding in the erection of houses of worship on missionary fields in this State, and by collecting and disbursing funds for these purposes, which corporation was to keep its principal office at Parkersburg, W. Va., in the County of Wood, and the same was to expire on January 1, 1940, which agreement set forth the amount subscribed to be four hundred and fifty dollars, and that forty-five dollars had been paid in, and stated that the subscribers desired the privilege of increasing the capital, by the sale of additional shares from time to time, to fifty thousand dollars in all, the shares to be fifty dollars. This agreement was properly signed, sworn to, and acknowledged, and filed in the office of W. M. O. Dawson, Secretary of State, on January 20, 1898. On the 28th of January, 1898, said Secretary of State refused to issue the charter applied for, stating that he was advised by the Attorney General that it would be illegal to issue a charter on said agreement. On February 8, 1898, said W. E. Powell and six others presented their petition to this Court verified by affidavit, together with exhibits, praying for a writ of *mandamus* to be directed to the Honorable W. M. O. Dawson, Secretary of State for West Virginia, to require and compel him to issue to said petitioners a certificate of incorporation declaring them to be a corporation in the name of the "Baptist Missionary Society of West Virginia;" and it appearing to the Court that the petitioners had on January 20, 1898, filed with said Secretary of State the agreement above mentioned, and had requested him to issue to them a certificate of incorporation as therein set forth, which he had refused to do, a *mandamus* was awarded, to which said W. M. O. Dawson, Secretary, etc., filed his answer, in which he admitted the facts above stated as to the filing of the agreement by said parties in his office for the purpose of obtaining a charter, which agreement complied with the statute, sworn to and acknowledged, but that he was advised, believed, and so answered that he has no authority, under the Constitution and laws of this State, to issue a certificate to the petitioners for the purposes set forth in said agreement, but is advised and so answers that the issuing of such a certificate of incorporation is in plain violation of the Constitu-

tion of West Virginia, as particularly set forth in section 47 of article VI, and that it is by reason of the inhibition of the Constitution aforesaid that he refused to issue said certificate. He admits that he did on January 28th refuse to issue said certificate, and still refuses, because it would, in his opinion, be contrary to the Constitution of the State so to do; wherefore he prayed judgment, and that he might be hence dismissed, and not required to perform the mandate of the alternative writ of *mandamus* aforesaid.

The question presented by this record is whether the Secretary of State was warranted in refusing the certificate of incorporation applied for by the petitioners. Can we sanction this action under section 47 of article VI which provides that "no charter of incorporation shall be granted to any such church or religious denomination," or under section 3 of chapter 54 of the Code, which provides that "this chapter shall not be construed to authorize the incorporation of any church or religious denomination, or of any company the object, or one of the objects of which is to purchase lands and resell the same for a profit?" The proposed corporation was to be known as the "Baptist Missionary Society of West Virginia." Its object, as set forth in the agreement, was to promote religion by aiding in support of Baptist ministers engaged in preaching the gospel, and by aiding in the erection of houses of worship, etc., and by collecting and disbursing funds for these purposes. Now, can we regard this in any other light than an attempt on the part of the Baptist Church to do indirectly through others what the Constitution and law expressly inhibits? There is no purpose expressed in this agreement which can be regarded otherwise than one of the prime objects of the Baptist Church. The first purpose is to promote religion by aiding in the support of Baptist ministers engaged in preaching the gospel. That this is one of the main objects of the Baptist Church, and in fact any other church, with respect to its ministers, needs no argument to sustain it. The church must have ministers, or it cannot prosper. The next purpose is to aid in the erection of houses of worship in missionary fields; and it is at once conceded that any denomination must have houses of worship, where its members may as-

semble and hear the gospel proclaimed; otherwise, its work languishes and its success is defeated. The last object mentioned, in said agreement, and perhaps not the least, has for its purpose collecting and disbursing funds for these purposes, and then the agreement expresses the general purpose of promoting religion.

Counsel for the petitioners, in their brief, state that petitioners are not a church or religious denomination, though they do not seek to hide the fact that their work is to be solely in the interest of the Baptist denomination of the State, and state that, under Baptist church government and policy, there is no church organization or authority beyond the local church, each local society being entirely independent. Conceding this to be so, let us inquire what would be the effect if six or seven of the members of each local Baptist church should enter into a similar agreement to the one presented by petitioners to the Secretary of State, and, on presentation, a charter should be granted them. Is it not apparent that in this way the Baptist Church in the State of West Virginia, through the intervention of such stockholders, would indirectly be allowed to do what, under the Constitution and the statute, it is not allowed to do directly, and the spirit and intent of the law be thus evaded and defeated? Corporations thus formed could be regarded in no other light than the agents of the Baptist Church, and each local Baptist Church, the members of which were thus incorporated, so far as benefits and privileges were concerned, would occupy precisely the same attitude and derive the same advantages as if the local church itself was incorporated. In the case of *Gallego's Ex'rs. v. Attorney General*, 3 Leigh. 450, Tucker, President, after reviewing the history of legislation with reference to church property and charitable bequests, on page 477 says: "No man at all acquainted with the course of legislation in Virginia can doubt for a moment the decided hostility of the legislative power to religious incorporations. Its jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions, as the church has been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows, as was remarked

by counsel, that wealth is power. Hence the provision in the bill of rights; hence the solemn protest of the act on the subject of religious freedom; hence the repeal of the act incorporating the Episcopal Church, and of that other act which invested the trustees appointed by religious societies with power to manage their property; hence, too, in part, the law for the sale of glebe lands; hence the tenacity with which applications for permission to take property in a corporate character (even the necessary ground for churches and graveyards) have been refused. The legislature seems to have been fearful that the grant of any privilege, however trivial, might serve, but as an entering wedge to greater demands."

The law under which this controversy arises descended to us from the state of Virginia. In the constitution of that state (Const. 1851, Art. IV, s. 32) it was provided that "the general assembly should not grant a charter of incorporation to any church or religious denomination, but might secure the title to church property to an extent to be limited by law;" and the same, in substance, is found in the Constitution of this State (Art. VI. s. 47). It is not our province to pass on the propriety of the law, but to construe and apply it as we find it. It is contended that a corporation formed for the purposes set forth in the agreement signed by the petitioners would be neither a church nor a religious denomination; but if they assume the duties of the Baptist Church in their locality, promote religion by aiding in the support of Baptist ministers engaged in proclaiming the gospel, by aiding in the erection of houses of worship, and by collecting and disbursing funds for these purposes, it makes little difference what name they may assume; they take upon themselves the main duties, responsibilities, and avowed objects of the church, and thus become the right hand of the church they represent. In my opinion, if the charter they ask for were granted, it would afford this church and every other church, of whatever denomination, an easy means of evading the law, and would, in effect, be granting a charter to the church. For these reasons, the peremptory *mandamus* is refused, and the petition dismissed.

Writ Denied.

CHARLESTON.

ROE v. TOWN OF PHILIPPI.

Submitted Sept. 15, 1898—Decided Jan. 20, 1899.

1. MUNICIPAL CORPORATIONS—*Street Improvements—Indebtedness—Mandamus.*

When an incorporated town has contracted for work to be done upon its streets, which work is done as provided in the contract, accepted by the town, and orders issued upon its treasury for the amount agreed to be paid therefor, such orders being presented and payment refused, and the holder of the orders sues out an alternative writ of *mandamus*, and defendant files his return and answer, offering no defense, except that, for the same year in which the contract was made and the work done, it had already, prior to the making of the contract, created a greater amount of indebtedness than the amount of the levy it was authorized to make upon the taxable property and persons and all other sources of revenue of the town to pay it, for such answer to be sufficient to defeat recovery it must show clearly that it had created such indebtedness to the full extent of its authority to levy before it made the contract with plaintiff, or, if its said prior indebtedness had not reached the full limit allowed by law, it should have shown that it had actually paid, on account of such contract for which said orders were issued, the amount the plaintiff could be entitled to receive out of such levy. (p. 791).

2. EVIDENCE—*Municipal Corporations—Certificate of Recorder—Records.*

The certificate of a recorder of an incorporated town, stating facts which appear upon the records of the common council of said town, and not certifying copies from such records, is not admissible as evidence (p. 790).

3. EVIDENCE—*Municipal Corporations—Certificate of Recorder—Mandamus.*

The question of the admissibility of such certificate as evidence

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when filed as an exhibit with the return and answer to an alternative writ of *mandamus* is properly raised upon motion of plaintiff for his peremptory writ, notwithstanding the answer (p. 790.)

Error to Circuit Court, Barbour County.

Petition by Joseph A. Roe, suing for the use of the Merchants' & Mechanics' Bank of Grafton against the town of Philippi, for *mandamus*. From a judgment dismissing the petition, petitioner brings error.

Reversed.

J. HOP WOODS, for plaintiff in error.

W. T. ICE, for defendant in error.

MCWHORTER, JUDGE:

On September 13, 1892, the town of Philippi, by its mayor and common council, contracted with Joseph A. Roe to macadamize a certain portion of Main street, in said town, according to the specifications prepared therefor by said mayor and council, at the price of one dollar and thirty-nine cents per perch of twenty-five feet, which was to be done in sections, and when each section should be completed for travel, and when so completed and approved and taken up by the superintendent to be designated by the town, the section so completed was to be paid for, less twenty per cent. thereof, which should be retained until the last section should be completed and accepted, when all should be paid in full. The work proceeded, and orders were drawn upon the treasurer of the town in favor of Roe from time to time, until the whole was completed in December following, when it was accepted by the mayor and council, and drafts or orders made for the balance due said Roe, including two orders for two hundred and seventy-five dollars each, upon the treasurer of said town, which orders were dated December 30, 1892, and payable to J. A. Roe or order, out of the levy of 1892, signed by the mayor, and countersigned by the recorder of said town, by order of the council, which orders on the same day of their date, were presented to the treasurer for payment, and by him indorsed "No funds." Roe afterwards, for valuable consideration, indorsed and assigned said orders to Mer-

chant's & Mechanics' Savings Bank. The same still remaining unpaid, the said bank, on the 2d of September, 1895, before the levy for that year was made, presented the orders to the town's treasurer, George E. Grant, and requested payment, or that provision be made for payment out of funds unappropriated, or out of the levy for the current year, etc. Payment was refused, and there was also a refusal to make provisions for such payment. On the 20th day of September, 1895, Joseph A. Roe, suing for the use of the Merchants' & Mechanics' Bank of Grafton, filed his petition in the circuit court of Barbour County, praying for a *mandamus*, requiring the said town of Philippi, which is an incorporated town, in the State of West Virginia, to levy a tax upon the taxable property in said town, and appropriate the same sufficient to pay off and discharge the said two drafts of two hundred and seventy-five dollars each, with interest from said 30th day of December, 1892, and the costs of the proceedings, or show cause, if any it could, why it should not be required to do so. An alternative writ of *mandamus* was issued returnable to October term of said court, 1895, and duly served. Defendant appeared, and moved to quash the writ, which motion, being considered by the court on February 18, 1896, was overruled, and the defendant given sixty days in which to file its return thereto. On the 25th day of May, 1896, defendant, the town of Philippi, tendered and offered to file its answer and return to the writ, to which return plaintiff objected, and moved the court to reject the same, because it was not filed within the sixty days allowed, which motion was overruled, and the return ordered filed, and the plaintiff was given leave to further except, demur, or plead thereto, or to move for the peremptory *mandamus*, as he might deem proper. On the 13th of November, 1897, plaintiff replied generally to the answer and return, and moved the court to award the peremptory writ of *mandamus* prayed for, notwithstanding the answer; and the matters of law and fact arising upon the record were by consent of the parties, submitted to the court. Upon consideration thereof, the court found for the defendant, and overruled the motion for the peremptory writ, and dismissed the petition, and gave judgment for costs against the plaintiff,

from which judgment plaintiff obtained from this Court a writ of error and supersedeas, assigning as errors the dismissing of the writ, and refusing to award the peremptory writ of *mandamus*.

The answer admits the town of Philippi to be an incorporated town, created by special act of the general assembly of Virginia in the year 1844, which act was amended by the legislature of West Virginia in 1871; that, by virtue of its said incorporation and the general law of West Virginia for the incorporation of cities, towns, and villages, it has power to improve its streets, to provide a revenue and appropriate the same, to make an annual assessment of taxable persons and property therein, to appoint a sergeant, a commissioner of revenue, and a treasurer, and to define their powers and prescribe their duties, to adopt rules for its own government and the transaction of its business, to give an additional license, and require a tax on the same, for anything for which a state license is required to be done within said town, to adopt and enforce all needful ordinances not contrary to the Constitution and the laws of the State, and to impose and enforce fines and penalties, to order an annual levy of two dollars per head upon all male persons within said town over the age of twenty-one years, and one dollar on every hundred dollars of value of real and personal property therein assessed with state taxes, and to collect the same; that, in pursuance of such power so vested in defendant, it entered into the said contract for the macadamizing of Main street in said town with stone, as set out both in the petition and answer; admits the performance of the work; that it was completed December 24, 1892; that during its prosecution the defendant issued orders to plaintiff in part payment thereof, payable out of the levy of 1892; and that on the 30th of December, 1892, it issued the two orders or drafts, of two hundred and seventy-five dollars each, numbered respectively, two hundred and twelve and two hundred and fourteen, which constituted part of the aggregate sum of two thousand one hundred and thirty-five dollars and four cents agreed to be paid for said work; but denies the allegation in the petition and writ that on the 13th of September, 1892, it had only issued drafts and made contracts of in-

debtedness to the extent of six hundred and six dollars and sixty cents, and was only indebted in the sum of one hundred and sixty-six dollars and ninety-two cents on account of deficit of preceding year; but, on the contrary, alleging that, previous to the 13th of September in said year, it had contracted work to be done on the streets, alleys, and sidewalks of said town to the aggregate amount of three thousand and thirty-one dollars and seventy-two cents, and filed a certificate made by the recorder of said town, marked "Exhibit Z," with said return, which is simply a list of orders issued by said town, under the following caption: "I, L. D. Robinson, recorder of the town of Philippi, do certify that the contracts for which the following drafts were issued were made prior to the 13th day of September, 1892, as appears from the records of said town: No. 76, John Hulderman, work on street, \$4.80," the beginning of the list, and followed by one hundred and thirty-eight other orders, running consecutively from said No. 76 up to 187, thence, with several breaks in the numbers up to two hundred and sixty-three, many numbers being left out. The amounts of said several orders are mostly small, ranging from thirty cents up, only four being over one hundred dollars, and aggregating the sum of two thousand eight hundred and sixty-four dollars and eighty cents. Said Exhibit Z closes with, "I further certify that the amount of indebtedness for 1891, which the council of 1892 was to provide for, was \$166.92," which, added to the aggregate of said orders makes the sum of three thousand and thirty-one dollars and seventy-two cents claimed in the answer to be the indebtedness of said year 1892, created by contract prior to the 13th day of September, 1892, the date of contract with plaintiff. Said certificate (Exhibit Z) is dated and signed by the recorder on the 10th day of March, 1896. There is nothing in this certificate except the inference to be drawn from the last clause, certifying the amount of the deficit from the year 1891, when any contract was made, out of which the orders grew contained in the list Z. There is not a date to a single one of the orders showing when it was issued or authorized. The recorder certifies "that the contracts for which the following drafts were issued were made prior to the 13th day of September, 1892, as appears from the records of said town." He fails, however, to show how

long prior thereto the contracts were made or the drafts issued,—whether within the year 1892 or some previous year.

It is insisted by appellant that this certificate of the recorder (Exhibit Z) is not competent evidence; while appellee contends that, no objection having been raised to its competency in the court below, it is too late to raise it in this Court for the first time. Under the rule in *Wells v. Town of Mason*, 23 W. Va., 456, the question was properly raised on plaintiff's motion for the peremptory writ of *mandamus* notwithstanding the answer. As to the sufficiency of the answer, chapter 130 of the Code provides that certificates of certain officers mentioned, of facts shown by the records in their keeping, or of what such records fail to show concerning assessment of lands, etc., may be used as evidence when filed in the suit in which it is proposed to be used as evidence, and notice thereof given to the opposite party or his attorney, as provided by said statute. And, while properly authenticated copies from the records of an incorporated town could be used as evidence, I am not aware of any authority for admitting as evidence a certificate of a recorder of such town certifying the facts that may appear on such records; and the answer cannot be supported by said Exhibit Z. In *Phares v. State*, 3 W. Va. 567, Syl. pt. 2. "It is error to admit as evidence a certified list of the voters ordered by the board of registration to be stricken from the registry; only the record of the proceedings of the board, or a copy thereof, properly certified to be a copy, is admissible evidence." The only defense set up in the answer is that the defendant had already, prior to the contract with plaintiff created indebtedness within the corporation year of 1892 to a greater amount than it was authorized to levy for in that year. It is admitted that the contract was made; that it was within the scope of defendant's powers and its corporate duties to provide proper streets, etc.; that the work was completed according to contract; and that defendant enjoyed the benefits arising from such improvements. Did the answer show that, at the time the contract was made, the defendant had already gone beyond the limit allowed by law?

It appears from the record that the resources of the town from "all sources" for the year 1892 amounted, in the aggre

gate, to the sum of two thousand nine hundred and fifty-three dollars and seventy-eight cents, which was the amount it could properly levy, collect and appropriate for that year. It is admitted there was a deficit from 1891, which had to be provided for, of one hundred and sixty-six dollars and ninety-two cents; and, according to plaintiff's showing, orders had been drawn on the funds prior to his contract, aggregating six hundred and sixteen dollars and sixty cents. The record shows that on May 21, 1892, the town contracted with G. W. Gall, Jr., for two thousand one hundred feet of curbing, at fifteen cents per foot, to be delivered on or before the 1st day of July, 1892, and at the same time authorized the purchase of ten gallons and a barrel of gasoline oil. On the 6th of July it accepted the bid of S. T. H. Holt to furnish and lay nine thousand hard-burnt brick, for sidewalks, at thirty six and one-half cents per foot for six-foot walk, and thirty-two cents per foot for five-foot walk. The record also shows that there was afterwards allowed to said Gall for curbing, two hundred and ninety dollars and two cents, and to said Holt, for laying brick pavement, four hundred and one dollars and forty-one cents, making the aggregate sum of one thousand four hundred and seventy-four dollars and ninety-five cents, which is shown to be proper to be provided for in the levy of 1892 at the time the contract was made with plaintiff to do the work he contracted to do. There are other items allowed in the meantime, "For work on streets," etc., but nothing to show when it was contracted for, and whether it would be right to pay it, to the exclusion of the money owing to plaintiff. This would leave a balance of one thousand four hundred and seventy-eight dollars and eighty-three cents of the levy of the year 1892, which could or should be applied to the indebtedness of the town to Roe on his contract. The exhibits properly authenticated from the records of defendant, and filed with the return to the writ, show orders allowed to plaintiff on account of his contract in all to amount to one thousand eight hundred and fifty dollars and eighty-three cents, but the return fails to show that any of these orders were ever actually paid to plaintiff, or to any one for him. The orders sued upon were assigned, and the suit is brought for the benefit of the assignee; and, after notice of assignment, they should be the first paid of all that should remain unpaid at

the time of such notice of assignment. To make a sufficient return to defeat recovery, defendant should have shown clearly that it had created indebtedness to the full extent of its authority to levy before it made the contract with plaintiff, or, if its said prior indebtedness had not reached the full limit allowed by law, it should have shown that it had actually paid, on account of such contract for which said orders were issued, the amount that plaintiff could be entitled to receive out of the levy. The judgment will be reversed and annulled, and the case remanded, with directions to the circuit court to award the peremptory writ of *mandamus* as prayed for.

Reversed.

CHARLESTON.

STATE v. STALEY.

Submitted Dec. 10, 1898.—Decided Jan. 20, 1899.

1. VERDICT—*Homicide—Form of Verdict.*

"We, the jury, agree and find the defendant, Virgil Staley, not guilty of murder in the first or second degree, as charged in the within indictment, but do agree and find the defendant, Virgil Staley, guilty of voluntary manslaughter,"—is a verdict sufficient in form (p 794).

2. COURT HOUSE—*Place of Holding Court.*

When the place of holding the courts of any county has been changed to another building in the same town temporarily, under section 7., chapter 114, Code, for the reason that the court house has been destroyed, no formal ceremony or notice is necessary to authorize the holding of courts in the new court house provided upon the site of the old one, when the same is ready for occupancy and in possession of the county authorities. (p. 795).

3. COURT HOUSE—*Place of Holding Court.*

Whenever such new court house is ready for occupancy, the reason for holding the court at such other place appointed has

45	792
46	366
46	506

45	792
47	219

45	792
148	578

45	792
52	367

45	792
54	529

45	792
59	184
59	199

ceased, and the courts are properly held in the new court house. (p. 795).

4. INSTRUCTIONS—*Error.*

Point 4, Syl., in *State v. Bingham*, 42 W. Va. 234, approved. (p. 799).

5. EVIDENCE—*Conflict of Evidence—Jury.*

Point 5, Syl., in *State v. Zeigler*, 40 W. Va. 594, disapproved and overruled. (p. 800).

6. EVIDENCE—*Witness—Impeachment—Credibility of Witness.*

The credibility of a witness who has been impeached by proof of a former declaration at variance with his testimony may be supported by evidence of his good character for truth and veracity. (p. 801)

7. EVIDENCE—*Witness—Impeachment.*

Where a witness is introduced by plaintiff for the first time in rebuttal, the defendant should be permitted to introduce evidence to impeach him. (p. 801).

8. REMARKS OF JUDGE—*Trial Court—Error.*

Remarks made by the trial judge in the presence of the jury (referring to a witness who had testified for the State), as follows: "Suppose Dr. Burgess, whose integrity is not to be questioned, when placed by a party upon the witness stand to testify as to matters coming within his professional conduct or employment, and having so testified, the opposite party was to bring in two or three witnesses from another county, say, from Huntington, who were entire strangers to the people of Wayne county, and who, upon the witness stand, were to testify to their having heard Dr. Burgess, in Huntington, make statements directly contradicting those made by him on the witness stand; would it not be a reasonable and logical rule that would permit the party so calling him to introduce, upon rebuttal, witnesses acquainted with his general reputation, to testify as to his good character for truth?"—the "two or three witnesses" referred to being summoned as experts on behalf of the defendant, and so testified in the case, touching the matter of the evidence of said witness Burgess,—*held* to be error, which might prejudice the defendant. (p. 805).

Error to Circuit Court, Wayne County.

Virgil Staley was convicted of voluntary manslaughter, and brings error.

Reversed.

MARCUM, MARCUM & SHEPHERD and J. M. TIEMAN, for plaintiff in error.

EDGAR P. RUCKER, ATTORNEY-GENERAL, and EDWIN M. KEATLEY, for the State.

MCWHORTER, JUDGE:

Upon an indictment against Virgil Staley in the circuit court of Wayne County for the murder of Lafe Adkins, in the form laid down in section 1, chapter 144, Code, the jury returned a verdict as follows: "We, the jury, agree and find the defendant, Virgil Staley, not guilty of murder in the first or second degree, as charged in the within indictment, but do agree and find the defendant, Virgil Staley, guilty of voluntary manslaughter." The prisoner, by his counsel, moved the court to set aside the said verdict, and grant him a new trial, because the verdict is not in good form, and because it is not certain, but is uncertain and indefinite, and does not state the jury finds the defendant guilty of any offense charged against him in the indictment in the case, which motion was overruled, and exceptions taken. Appellant's counsel say this was error, and that their contention on this point is clearly borne out in *State v. Newsom* 13 W. Va. 859, where it is held that no judgment could be entered upon the verdict in that case, because it was too vague, indefinite, and uncertain. That was an indictment under section 9, chapter 144, Code 1868, for unlawful shooting, etc. The verdict was: "We, the jury find the prisoner, James Newsom, guilty of unlawful shooting with intent to maim, disable, disfigure, and kill, and ascertain the term of his confinement in the penitentiary at one year; and we find him not guilty of malicious shooting." It will be observed that the verdict just quoted makes no reference whatever to the indictment. In *Hoback v. Com.*, 28 Grat. 922, the verdict is in almost the precise words as the one at bar: "We, the jury, find the defendant John Hoback, not guilty of malicious shooting, as in the within indictment charged, but guilty of unlawful shooting with intent to maim, disfigure, disable, and kill, and fix his term of confinement," etc.,—which verdict was sustained. The whole verdict must be taken together, and being indorsed on the indictment, or referring to it, such reference applies as to the whole verdict, and there can be no uncertainty about it. Judge Moncure, in his opinion in *Hoback's Case* says: "A verdict of a jury in a criminal case must always be read in connection with the indictment. And if it be certain, upon reading them together, what is the meaning of the verdict, it is sufficiently certain."

It is contended also, as set out in the bill of exceptions No. 10, that the court erred in refusing appellant's motion to set aside the verdict and grant him a new trial, because the trial was not commenced, held, and had at the court house of Wayne County (wherein the trial was held), and also in refusing his motion in arrest of judgment upon said verdict, as set out in his bill of exceptions No. 11. In support of his contentions, he introduced witnesses, as well as the proclamation of the governor, to prove that the court house of Wayne County, on the 6th day of March, 1896, was totally destroyed by fire, and that the lower room of the Odd Fellows' Building, in the town of Fairview, wherein the court house was located, had been by the governor of the State, under section 7, chapter 114, Code, designated and appointed as the place for holding the county and circuit courts for said county so long as the reason therefor might continue. The court house of the county had been burned, and, under the statute, temporary provision had been made for holding the courts in another building, only as long as the reason therefor continued. When the court house was replaced and fit for occupation, the reason for holding the court elsewhere continued no longer, and it appears from the record that the court was being held in the court house when the trial of appellant was began, and was had and completed there. Section 11, chapter 114, Code, provides that "when the place of holding any court or the day for commencing any term is changed. * * * there shall be no discontinuance, but every notice, recognizance or process taken or returnable to the day on which the failure occurred, or to any day between that day and the next that the court may sit, or to the day and place as it was before such change, * * * shall be in the same condition and have the same effect, as if given, taken or returnable, or continued to the substituted time and place," etc. It was doubtless a notorious fact that court was being held in the new court house, the place provided especially for it, and I see no provision in the statute for any ceremony to enable the county authorities to take possession or occupy the building erected for that purpose; but, whenever it is so occupied, the temporary occupation of the substituted place has ceased, and the reason for its occupation no longer continues; and to cease to occupy for court purposes

the regular court house again, no matter how informally it may have been appropriated to the use of a court house, some one of the reasons for vacating it set forth in section 7 of chapter 114 of the Code must exist, and the necessary steps taken therefor under said chapter. The trial began and was proceeded with, without objection, until its close, when, before sentence of the prisoner, he moved in arrest of judgment for that reason, which motion was properly overruled. This is a purely technical objection. No constitutional right of the prisoner was violated, nor was he in any way prejudiced by it.

Appellant's bill of exceptions No. 2 is to the giving of the State's instructions to the jury, Nos. 1 to 7, inclusive: Instruction No. 1: "The court instructs the jury that, where a homicide is proved, the presumption is that it is murder in the second degree. If the State would elevate it to murder in the first degree, she must establish the characteristics of the crime; and, if the prisoner would reduce it to manslaughter, the burden of proof rests upon him." Instruction No. 2: "The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act. And if the prisoner, with a deadly weapon in his possession, without any or upon very slight provocation, gives to another a mortal wound, the prisoner is *prima facie* guilty of willful, deliberate, and premeditated killing, and the necessity rests upon him of showing extenuating circumstances, and unless he proves such extenuating circumstances, or the circumstances appear from the case made by the State, he is guilty of murder in the first degree." Instruction No. 3: "The court instructs the jury that the use of a deadly weapon being proved, and the prisoner relies upon self-defense to excuse him for the use of the weapon, the burden of showing such excuse is on the prisoner, and, to avail him, he must prove such defense by a preponderance of the evidence." Instruction No. 5: "The court instructs the jury that the fact of one person having threatened to take the life of another or to inflict upon him a great bodily injury will not excuse the person so threatened in becoming the aggressor, and with deadly weapon, assaulting the person making such threats, and that although the jury may believe from the evidence that Lafayette Adkins, in his life-

time, had made threats to take the life of the prisoner or to inflict upon him great bodily harm, the fact of making such threats towards the prisoner will not justify a verdict of acquittal, unless the jury further find that, at the time the said Lafayette Adkins was shot, he was making overt acts towards the prisoner, indicative of an intention to carry such threats into immediate execution, and that, by reason of such threats and overt acts, he (the prisoner) believed that it was necessary then and there to shoot with a deadly weapon the said Lafayette Adkins, in order to save his (the prisoner's) life, or to protect him from great bodily harm." Instruction No. 4: "The court instructs the jury that they are the sole judges of the weight of testimony of any witness who has testified before them in this case at bar, and that, in ascertaining such weight, they have the right to take into consideration the credibility of such witnesses, as disclosed from his evidence, his manner of testifying and demeanor upon the witness stand, and his apparent interest, if any, in the result of the case. And, if the jury believe that any witness has testified falsely as to any material fact, they have the right to disregard all the testimony of such witnesses so testifying falsely, or to give his testimony, or any part thereof, such weight only as the same in their opinion, may be entitled to." Instruction No. 6: "The court instructs the jury that after they shall have compared and considered all the evidence in the case, if they have a reasonable doubt as to the guilt of the prisoner, Virgil Staley, as charged in the indictment, they cannot convict; that by reasonable doubt is meant such doubts based upon the evidence as they may honestly and reasonably entertain as to any material fact essential to prove the crime charged. It must not be an arbitrary doubt, without evidence to sustain it, but must be serious and substantial in its nature, in order to warrant an acquittal, and one which men may honestly and conscientiously entertain." Instruction No. 7: "The court further instructs the jury that, if they find the prisoner guilty as charged in the indictment, they shall further find whether he is guilty of murder in the first or second degree. If they find him guilty of murder in the first degree, they may, in their discretion, further find that he (the prisoner) be punished by confinement in the peni-

tentiary; and, if such further finding be not added to such verdict, the judgment thereupon rendered by the court will be that the prisoner be punished with death; and, if such further finding is added, the judgment thereupon rendered by the court will be that the prisoner be confined in the penitentiary during his life. If they (the jury) find the prisoner guilty of murder in the second degree, as charged in the indictment, the punishment imposed upon the prisoner will be confinement in the penitentiary not less than five years nor more than eighteen years."

While the exceptions go to all these instructions, a careful examination of the first six fails to disclose anything objectionable or which could be prejudicial to the rights of the appellant, and no special or definite objections are raised thereto. It is contended, however, that No. 7 is clearly wrong, in that it tells the jury what penalty could be imposed upon the prisoner if they should find him guilty of either murder in the first or second degree; that the court, in using the language of the instruction, expresses its opinion as to the weight and sufficiency of the evidence in the case to warrant the jury in finding the prisoner guilty of murder in the first degree; that such a verdict, in the court's opinion, would be a proper verdict. The court only propounded the law as laid down in the statute. The prisoner was charged with murder. He did not deny the killing. He assumed the burden of proving that the killing was done in self-defense. Whether he had succeeded, or to what extent he had succeeded, was a question solely for the jury. It was entirely proper for the jury to understand what would be the result of this verdict,—what punishment would follow. The verdict itself shows that the jury were not misled by the instruction, and that they by no means took the view of the instruction as contended by appellant.

Bill of exceptions No. 3 complains of the ruling of the court in refusing to give instructions Nos. 6, 8, and 10, and each of them. No. 6: "The court further instructs the jury that if, from all the facts, circumstances, and evidence in this case, they have a reasonable doubt as to the defendant's guilt they must find him not guilty." No. 8: "The court further instructs the jury that the law presumes the defendant, Virgil Staley, innocent until he is clearly and conclusively proven guilty beyond all reasonable doubt;

and, if there is upon the minds of the jury any reasonable doubt of the defendant's guilt, the law makes it their duty to find him not guilty; that, even if there was suspicion or probability of his guilt, however strong, such suspicion or probability would not be sufficient, even though the greater weight or preponderance of evidence supported the charge in the indictment, nor, upon the doctrine of chances, it were more probable that the defendant is guilty; but to warrant his conviction, his guilt must be proved so clearly and conclusively that there is no reasonable theory upon which he can be innocent, for the policy of our law deems it better that many guilty persons should escape rather than that one innocent person should be convicted." As to No. 6, while it propounds the law correctly, the court had thoroughly instructed the jury on the question of reasonable doubt by giving state's instruction No. 6, and defendant's instructions Nos. 1 and 3, as follows: No. 1: "The court instructs the jury that the law presumes that the defendant, Virgil Staley, is innocent of the crime charged against him in the indictment in this case, and that such presumption follows him throughout every step of the trial; that it is incumbent upon the state to establish the prisoner's guilt by proof so clear and convincing and satisfactory in its nature as to convince the jury of his guilt beyond all reasonable doubt; that before the jury can find the defendant guilty in this case, they must believe and be satisfied from the evidence in the case, beyond all reasonable doubt, that he is guilty; that if the jury, or any member of the jury, after having carefully weighed and considered all the evidence in the case, should entertain a reasonable doubt as to the guilt of the defendant, they cannot return a verdict of guilty." No. 3: "The court further instructs the jury that, in determining the question of the defendant's guilt or innocence in this case, it is their duty to take into consideration the good character of the defendant, as developed from the evidence in this case; and, if from such evidence, as well as from all the other evidence, facts, and circumstances in this case, the jury have a reasonable doubt as to the guilt of the defendant, they must find him not guilty."

It was not error to refuse No. 6. In *State v. Bingham*, 42 W. Va. 234, (24 S. E. 883, Syl. point 4), it is held that "when instructions given clearly and fairly lay down the

law of the case, it is not error to refuse other instructions on the same subject. The court need not repeat instructions already substantially given." See, also, *Davidson v. Railway Co.*, 41 W. Va. 407, (23 S. E. 593, Syl. point 2). Instruction No. 8 is also upon the question of reasonable doubt, but goes much further than the other instructions given on that point, and which fully propound the law, while No. 8 would, if given, tend to confuse and mislead the jury, and was properly rejected. It is contended that instruction No. 10, being in the exact language of point 5, Syl., in *State v. Zeigler*, 40 W. Va. 594, (21 S. E. 763), should have been given, that it was error to refuse it. While it is true it is so held in the *Zeigler Case*, yet it is in conflict with instruction 3 given for the State, which is a copy of point 1, Syl., in *State v. Jones*, 20 W. Va. 764; and it is also a fact that the opinion in the *Zeigler Case* quotes with approval the holding in the *Jones Case* and on page 609 says: "The first instruction asked for by the prisoner was properly rejected, as it fails to state the law as laid down in the case of *State v. Jones*, 20 W. Va. 764;" and yet the said "first instruction" somehow, evidently by inadvertence, crept in as a syllabus of the case. In *Com. v. York*, 9 Metc. (Mass.) 93, it is held that "when, on a trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of the law is that it was malicious, and an act of murder; and proof of matters of excuse or extenuation lies on the defendant, which may appear either from evidence adduced by the prosecution, or from evidence offered by the defendant. But, when there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and to decide the fact upon which the excuse or extenuation depends, according to the preponderance of evidence." *Silvus v. State*, 22 Ohio St. 90; *Weaver v. State*, 24 Ohio St. 584; *State v. Willis*, 63 N. C. 26; *Hill v. Com.*, 2 Grat. 595; *State v. Greer*, 22 W. Va. 800, Syl. point 19. The court did not err in refusing said instruction No. 10, because it does not correctly propound the law.

Appellant's bill of exceptions No. 4, referred to in the fifth assignment of error, shows that, when defendant was on the witness stand in his own behalf, he was on cross-ex-

amination asked if he had not had conversations at certain times and places with certain parties named, wherein he had made threats against Lafe Adkins, which threats he denied; and the State, in rebuttal, introduced the testimony of such parties with whom he had had the conversations wherein he had made such threats, etc., and thereby contradicted said defendant as to such conversations; and the State then rested her case, when defendant offered to prove by witnesses well acquainted with defendant, and with his general reputation for truth and veracity in the community in which he lived, that he sustained a good and unimpeachable reputation for truth and veracity among all his neighbors in the county in which he lived, which evidence the defendant was not permitted to introduce. "The credibility of a witness who has been impeached by proof of a former declaration at variance with his testimony, may be supported by evidence of his good character for truth and veracity." 10 Enc. Pl. & Prac. 326, and cases there cited. Evidence of the contradictory statements must actually be introduced. Merely laying the foundation is not sufficient to let in evidence of good character. *State v. Cooper*, 71 Mo. 436.

Bill of exceptions No. 5 involves the same matter, and, further, defendant proposed to introduce witnesses who were neighbors and well acquainted with Thomas D. Hutchison, one of the witnesses who so contradicted defendant, and with his general reputation for truth and veracity among his neighbors, to prove that such reputation was bad, and, that he was not entitled to credit as a witness which evidence the court refused to admit for the reason stated,—that, according to the rules and practice of all courts, the rebuttal testimony by the State concluded the evidence in the case, and the defendant could not and should not introduce any further testimony in the case. If the witness proposed to be impeached had been before examined by the State on the main issue, the court would have it in its discretion to so rule when the witness was recalled in rebuttal, but, being introduced in rebuttal for the first time, the defendant should have the right to impeach him if he could.

Bill of exceptions No. 6 presents the converse of this question raised in No. 4. State's witness Shird Mullins, on

cross-examination had been inquired of as to certain conversations he had had with various persons named relative to his knowledge of certain facts and circumstances attending the killing of Adkins, and tending to contradict the evidence given by the witness at the trial, and the defendant had introduced the said several persons as witnesses to contradict witness Mullins, when the court permitted the State to introduce witnesses to prove the general good reputation of Mullins for truth and veracity, to which ruling of the court permitting such testimony to be given defendant excepted. For the reasons before given, the court did not err therein.

The eighth bill of exceptions, referred to in the eighth assignment of error, is as follows: "Be it remembered that, upon the trial of this cause, the defendant, Virgil Staley, had caused to be summoned and sworn, as witnesses for him and in his behalf, Dr. L. J. Stump and Dr. C. C. Hogg, two regular practicing physicians residing in Cabell county, in the city of Huntington; that it was well known in the court and to the attorneys for the State that said witnesses, Stump and Hogg, had been summoned to testify on the part of the defendant, and for the purpose of showing, by them, that the death of Lafe Adkins, the party named in the indictment as having been shot and killed by Virgil Staley, was not caused nor produced by the wounds alleged to have been inflicted upon his body by the said defendant, but was, in fact, caused and produced by an operation that was performed upon him, after said wounds had been inflicted, by his attending physicians, Drs. G. R. Burgess, A. G. Wilkinson, and — Bruns. And be it further remembered that during the progress of the trial, and at the time when the State was offering to introduce certain witnesses for the purpose of supporting the testimony of one Shird Mullins a witness who had been examined on behalf of the State, and who had been contradicted by various witnesses examined on behalf of the defendant, by showing that he, the said Mullins, had made statements out of court relative to his knowledge of the facts of the killing of the said Lafe Adkins that contradicted his evidence upon the witness stand, that the defendant objected to the introduction of the evidence tending to prove the general reputation for truth and veracity of the said wit-

ness, Mullins. And be it further remembered that after the objections so made by the defendant to the introduction of said evidence had been fully discussed by counsel for the State, as well as for the defendant, the court proceeded to render its judgment or opinion upon said objection, overruling said objection, and giving its reasons at length therefor; and that, while so giving its reasons as aforesaid, the court stated, in hearing of the jury trying the case, as follows, to-wit: "The question before the court is, can the State, after defendant's witnesses have testified to statements alleged to have been made by Shird Mullins out of court contradicting those made by him upon the witness stand, introduce other witnesses by way of rebuttal to prove his good character for truth? Jones, in his work on Evidence (section 847), says that one way to impeach a witness is by proving statements of the witness made out of court inconsistent with or contradicting those made by him upon the witness stand. If the witnesses so contradicting Mullins are worthy of credit, then he has made false statements as to the same subject-matter, either out of court or upon the witness stand. Now, for the purpose of illustrating, let us take Dr. Burgess. Defendant's attorneys have used him as a means of illustrating in their argument upon this question. Suppose Dr. Burgess, whose integrity is not to be questioned, were placed by a party upon the witness stand to testify as to matters coming within his professional conduct or employment, and, having so testified, the opposite party were to bring here two or three witnesses from another county—say, from Huntington—who were entire strangers to the people of Wayne county, and who, upon the witness stand, were to testify to their having heard Dr. Burgess in Huntington make statements directly contradicting those made by him upon the witness stand; would it not be a reasonable and logical rule that would permit the party so calling him to introduce, upon rebuttal, witnesses acquainted with his general reputation to testify to his good character for truth? Jones, in his work on Evidence, in section 871, says that the authorities in this country on this question are conflicting, and in support of the rule cites a number of decisions, among which is that of *George v. Pilcher*, 28 Grat. 299. If this has been the rule in the State of Virginia, the same rule, and

I think the right one, should, by inheritance, prevail in West Virginia. The said Dr. Burgess above referred to being the same Dr. Burgess who had testified upon this trial as a witness relative to the character of the wounds inflicted upon the body of the said Lafe Adkins, and as to the manner of performing the operation upon him. Which said remarks so made by the court, in the presence and hearing of the jury as aforesaid, the defendant then and there expected to, upon the ground that said remarks so made by the court relative to the character and standing of the said witness, G. R. Burgess, as a man and a physician, tended to influence the jury in the weight to be given to his said evidence in favor of the State, and tended to the prejudice of the prisoner in weakening the evidence and the weight thereof of the physicians Hogg and Stump, which were thereafter given to the jury, and prays that his bill of exceptions No. 8 be signed, sealed and saved to him, which is accordingly done."

The courts have ever been exceedingly careful of the province of the jury in the trial of cases. In *McDowell v. Crowford*, 11 Grat. 405, Judge Moncure quotes approvingly 1 Rob. Prac. 338-344, where the cases are collected, and says: "They evince a jealous care to watch over and protect the legitimate powers of the jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that, when the evidence is parol, any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as proven, or even an intimation that written evidence states matters which it does not state, will be an invasion of the province of the jury." JUDGE GREEN, in *State v. Hurst*, 11 W. Va. 51, referring to those cases cited by Judge Moncure, says they were all civil cases, and that "there is and ought to be a distinction between the trial of civil and criminal cases in many important particulars," and continues: "If the province of the jury in a criminal case may be allowed to be invaded, the liberty and lives of the citizens would not be safe. In times of peril, when commotions in the state exist untrammelled, jury trials are the greatest safeguard of the citizens. If, in a civil case, it is error, for which the verdict should be set aside and the judgment revoked, for

the court to make a remark, in the presence of the jury, calculated to mislead them, or calculated to cause them to give more or less weight to any testimony before them, for much stronger reasons would it be error to make the same remark in the trial of a criminal case." This subject is discussed at some length by JUDGE DENT in *Neill v. Produce Co.*, 38 W. Va. 228, (18 S. E. 563), and the cases there cited. The remarks made by the judge in this case, it is true, were by way of illustration; but unfortunately, for the purpose of the illustration, he named one of the State's witnesses who had been examined in the case, and referred to him as one "whose integrity is not to be questioned." Suppose that he were placed by a party upon the witness stand to testify as to matters coming within his professional conduct or employment (just as the witness referred to had testified in this case), and, having so testified, the opposite party were to bring two or three witnesses from another county,—say from Huntington,—who are entire strangers to the people of Wayne County, and who, upon the witness stand, were to testify to their having heard the said State's witness make statements directly contradicting those made by him upon the witness stand, etc. While the judge did not mention the names of the supposed witnesses from Huntington, yet it was a fact that defendant had two witnesses from Huntington, summoned there, and placed them upon the stand to testify in the case as experts touching the matter of the evidence given by the witness Burgess. What was necessarily the tendency of the remarks on the minds of the jury but to make an impression thereon highly favorable to the testimony of the State's witness, who was so referred to by the court, as of unquestioned integrity, and, consequently, his testimony was entitled to the greatest weight, while the other witnesses were mentioned as entire strangers, brought from another county, whom the people of Wayne county did not know? The tendency of the remark would be to weaken their testimony in the estimation of the jury, to the prejudice of the defendant. Whether it affected their verdict or not we cannot tell. Taking the whole record together, I am inclined to the opinion that none of the errors complained of really affected the minds of the jury prejudicially to the rights of the defendant; yet they

may have done so, and, without such errors, it is possible the jury might have returned a verdict more favorable to him. For the reasons herein stated, the verdict will be set aside, the judgment revoked, and the case remanded for a new trial to be had therein.

Reversed.

45	806
53	224
45	806
57	540
57	541

45	806
59	622
59	626
59	636

CHARLESTON.

CARTER v. TYLER COUNTY COURT.

Submitted February 6, 1897—Decided January 25, 1899.

1. OIL LEASE—*Oil and Gas—Real Estate.*

Where a party holds a lease upon land for oil and gas purposes, upon the usual terms and conditions, paying one-eighth of the oil produced as royalty, the oil while it remains *in situ* must be regarded as realty, and as remaining the property of the lessor until brought to the surface. (p. 810).

2. TAXATION—*Oil and Gas—Oil Lease—Personal Property.*

The prospective production of oil from such well cannot be properly charged to the lessee, on the personal property books of the county. (p. 811).

3. TAXATION—*Fixtures—Personal Property.*

Under chapter 29 of the Code, which provides for the assessment of taxes, the words "personal property," as therein used, shall include all fixtures attached to the land, if not included in the valuation of such land entered in the proper land book (p. 808).

Error to Circuit Court, Tyler County.

Application of John J. Carter to the county court of Tyler County for relief against erroneous assessment. From the judgment, petitioner brings error.

Modified.

JOHN H. MCCOY and ROBERT McELDOWNEY, for plaintiff in error.

ANTHONY SMITH, for defendant in error.

ENGLISH, JUDGE:

John J. Carter gave notice to the prosecuting attorney of Tyler County that on the 17th day of January, 1894, he would apply to the county court of said county, under sections 94, 95, 96, and 97 of chapter 29 of the Code, for relief against an erroneous assessment on the personal property books of said county, in which he claimed he was erroneously charged with oil at a valuation of eighty-one thousand dollars,—ninety oil wells,—and that he would introduce evidence of such charge, and move said county court to enter an order granting him relief from such erroneous assessment. In pursuance of said notice, Carter presented his petition, specifying therein that he was assessed with ninety oil wells, at a valuation of eighty-one thousand dollars, and with seventy-two thousand dollars as the value of the capital used by him in his business, also setting forth therein the reasons why said assessments were illegal and erroneous. The prosecuting attorney objected to the consideration of so much of the applicant's petition as referred to the assessment of the item of seventy-two thousand dollars, value of machinery, etc., as stated in column eighteen of said personal property book, upon the ground that no notice of the intention of said petitioner had been given him that he would ask the court to be released from the payment of taxes upon said item, to which objection the petitioner replied generally. As to this objection the record shows that due notice of the said petition was given the prosecuting attorney, and that he appeared on behalf of the State, and objected to the consideration by the court of so much of the applicant's petition as refers to the assessment of the item of seventy-two thousand dollars, value of machinery, etc., as stated in

column eighteen, and agreed that the said petition be continued until the 6th of February, 1894, which had the effect of waiving the notice required by statute, the only object of which being that the interest of the State, county, and district might be represented in the matter. Now, it appears that the sum of seventy-two thousand dollars was assessed upon the engines, boilers, rigs, and appurtenances, such as casing, etc., belonging to the ninety wells in the proceedings mentioned. This machinery and the appliances connected therewith were in use by the petitioner, Carter, in the production of oil from the wells he had leased; and, in determining whether this property was properly placed upon the personal property books of said county, we must determine whether they should be classed as realty or personalty.

I am not unaware of the diversity of opinion expressed by text writers, and the almost irreconcilable conflict of decisions by the different courts, which would necessarily be encountered in investigating the question as to when machinery and appliances used by tenants in the prosecution of the various industries and mining operations upon the lands of their lessors are to be considered personalty, and when realty; but we are spared the labor and perplexity attending this investigation by our statute, which provides (Code, c. 29, s. 46) that the "words 'personal property' as used in this chapter shall include all fixtures attached to land, if not included in the valuation of such land entered in the proper land book." The machinery and appliances about these ninety oil wells appear to have been assessed to the petitioner, Carter, at eight hundred dollars each, or seventy-two thousand dollars for the whole. The question as to whether such assessment was excessive or not was a question of fact, which was passed upon by the county court after hearing testimony in behalf of both parties, the court finding that the property was not excessively valued for taxation. The evidence was certified and the case appealed to the circuit court, and the finding of the county court was affirmed by that court; and, while there may be some slight conflict in the testimony as to the valuation of the property, this Court would not undertake to disturb the finding of the county court, or to place a proper assessment of valuation on said property.

especially when the county court was confronted with the witnesses and heard their testimony. The ruling of the county court and the circuit court, therefore, as to this property being properly placed on the personal property book, and the assessment not being excessive as applied to the machinery and appliances is affirmed.

The prosecuting attorney also objected to the consideration of an affidavit presented with said petition, made by one S. G. Pyle, who stated therein that in the spring of 1893 he assisted J. K. Smith, assessor of Tyler County, W. Va., in making out said assessor's books, and extending levy on same, and that it was his information that the several oil wells in and about the town of Sistersville, consisting of rig, engine, boiler, casing, and other appurtenances thereto for the purpose of operating for oil, were assessed at eight hundred dollars each respectively, for the purpose of taxation, and in addition thereto, the several wells south of said town of Sistersville, Tyler County, aforesaid, within said county, producing petroleum oil, were assessed upon a production of ten barrels per day from the 1st of April, 1893, for the said assessment year, beginning at ten barrels on April 1, 1893, and running down to nothing on April 1, 1894, or an average of ten barrels per day for six months, and fifteen days at an assessed value of fifty cents per barrel. The wells north of said town were assessed at a daily production of fifteen barrels per day, on the same basis as the ten barrel wells, at the same rate per barrel, and for the same length of time. Which objections of the prosecuting attorney were sustained, and thereupon the court proceeded to hear the evidence of said S. G. Pyle, which was reduced to writing, and signed by him, which fact makes it unnecessary for us to pass upon the propriety of the action of the court as to the exclusion of the affidavit of said Pyle.

The depositions of John Carter and other witnesses were taken in open court, and the petitioner, by his attorneys, moved the court to strike from said personal property book the entry of the assessments against Carter for the year 1893; which motion, being argued and considered by the court, was overruled, the court holding that said property was not excessively valued for taxation, and that it belongs to the property books. To this opinion of the court the petitioner, by his attorneys, excepted, and on his motion,

the court certified all the evidence taken in the case; and from these proceedings of said county court on March 15, 1894, John J. Carter obtained an appeal to the circuit court of Tyler County. On the 15th of August, 1894, the appellant, John J. Carter, by his attorneys, filed, with the papers of the cause, a copy of the entry of the personal property of said Carter on the property books of Tyler County for the year 1893; also 44 copies of certain oil leases, deeds, and assignments of oil leases, which were copied in the record. On the 17th of December, 1894, said appeal was heard by the circuit court, and the judgment of the county court appealed from was affirmed, and from this judgment of the circuit court this writ of error was obtained.

Did the circuit court err in affirming the judgment of the county court, and thereby holding that the property of the plaintiff in error, consisting of the prospective product of ninety oil wells for the year 1893, was not excessively valued for taxation, and that the same was properly placed on the personal property books? In determining this question it is proper that we should first consider the nature and character of the contract between the lessor and the lessee. One of the main features of the contract embodied in these leases is that the lessee shall put down the wells and bring the oil to the surface; and, when thus produced, the landlord is to have one eighth as rent or royalty, and the lessee seven-eighths. While the oil remains in the cavities of the rocks *in situ*, this Court has held, in *Wilson v. Youst*, 43 W. Va. 826, (28 S. E. 781) and *Williamson v. Jones*, 39 W. Va. 231, (19 S. E. 436) that it is part of the realty. The lessee may drill the well to the sand or rock in which the oil is contained; but the oil does not change its character from realty to personalty, or any portion of its ownership, until it is brought to the surface, and then seven-eighths of it becomes the property of the lessee.

Can we say that the commissioner of the revenue of Tyler County, on the 1st of April, 1893, in assessing the prospective product of the ninety wells as the property of the lessee, John J. Carter, was right? While he was the owner of the wells that had been drilled in the rocks, they were merely the conduit through which the oil might be drawn to the surface, and he had the privilege of pumping it to the

surface; but the oil in its place among the rocks, was not his, and might possibly never be. See *State v. Oil Co.*, 42 W. Va., 102 (24 S. E. 688). Again, it is part of the history of this oil territory that what might be a productive, playing well this week or this month may not be worth pumping next week or next month. Aside from all this, said Carter, on the 1st day of April, 1893, was the owner of no oil, the product of the year commencing on that day; and he could not be assessed on property that he had not yet acquired, and it would be too speculative to assess him on property that he might thereafter acquire by future exertion. Now, the duty which the assessor attempted to perform in this instance is required by section 54 of chapter 29 of the Code, which provides that "it shall be the duty of the assessor, as soon as possible after the first day of April in each year, to ascertain all personal property subject to taxation in his district with the value thereof and the name of the person to whom the same ought to be assessed, and to make proper entry thereof in his personal property book." If the assessor, in pursuance of this statute, had gone to John J. Carter on the 1st day of April, 1893, and required him to return the list of his personal property under oath, he surely could not have returned one gallon of oil as the prospective product of said ninety wells for the year commencing April 1, 1893, and ending April 1, 1894, for the plain reason that no portion of the oil underlying his leases, while it remained beneath the surface, was his property. Section 40 of chapter 29 of the Code provides that "as to real property the person who by himself or his tenant has the freehold in his possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation." See, also, opinion of HOLT, JUDGE, in *State v. Oil Co.*, 42 W. Va. 102, (24 S. E. 688) and *United States, Coal, Iron & Mfg. Co. v. Randolph County Court* 38 W. Va. 201, (18 S. E. 566 Syl. point 2.) We are not, however, required to pass on the question as to what party should be assessed with the oil *in situ* in this case, but do hold that it is not assessable as personalty. I therefore hold that the assessor of Tyler county improperly placed upon the personal property books of said county, as the property of said John J. Carter, ninety oil wells, valued, for the year commencing April 1, 1893, at eighty-seven thousand, seven hundred and fifty dollars,

and that the county court erroneously held that said property belongs on the personal property books. I am further of opinion that the circuit court erred in affirming the judgment of said county court. The judgment complained of is therefore reversed so far as it holds that said Carter was properly assessed with the item of eighty-seven thousand seven hundred and fifty dollars as the prospective product of said ninety wells as personal property.

Modified.

45	812
53	430
45	812
56	487
45	812
56	350
60	385

45	812
62	79
62	818

CHARLESTON.

BOARD OF TRUSTEES OF OBERLIN COLLEGE *v.* BLAIR *et al.*

Submitted Sept. 26, 1898—Decided Feb. 4, 1899.

1. FRAUD—*Burden of Proof.*

The *onus probandi* is on him that alleges fraud, and, if the fraud is not strictly and clearly proved as it is alleged, relief cannot be granted. (p. 821).

2. EQUITY—*Fraud—Mistake.*

To entitle a plaintiff to relief in equity on the ground of mistake or fraud, the mistake or fraud must be clearly established. (p. 822).

3. FRAUD—*Proof of Fraud.*

The general principles applicable to fraudulent representations are well settled. Fraud is never presumed, and, where it is alleged, the facts sustaining it must be clearly made out. (p. 822).

4. TRUSTS—*Sales—Purchase by Trustee.*

While it is true that a trustee or agent cannot be interested in a sale made by himself, yet when he has fully discharged his trust, and sold property to a third person in good faith, having no interest in the same at the time, he may afterwards acquire the title from the purchaser; and such fact will not afford ground for avoiding the sale. (p. 820).

5. AGENCY—*Real Estate Agent.*

The agency of a real estate agent and his duty to his principal ceases upon the delivery of the title and payment for the property. (p. 820).

6. AGENCY—*Real Estate Agent.*

After the termination of the agency, the agent has the same right as any other person to deal in the property. (p. 820).

Appeal from Circuit Court, Doddridge County.

Suit by the Board of Trustees of Oberlin College against J. V. Blair, trustee, and others. Decree for plaintiff, and defendants appeal.

Reversed.

SMITH D. TURNER, VAN WINKLE & AMBLER and W. P. HUBBARD, for appellants.

W. N. MILLER, T. E. BURTON, G. W. FARR and BROWN, JACKSON & KNIGHT, for appellee.

ENGLISH, JUDGE:

A controversy existed between C. R. Gains, F. K. Knight, and the Trustees of Oberlin College in regard to a tract of land situated in Doddridge County, containing three hundred and thirty acres. In July, 1895, said parties agreed upon a compromise whereby they should all convey to J. V. Blair the titles they had. Blair was to sell the land, and divide the proceeds between them, giving one-half to the college and dividing the other half between Gains and Knight. In pursuance to this agreement, in September, 1885, and January 1886, the college, Knight and Gains conveyed said three hundred and thirty acres to said Blair

trustee, to sell and convey said land under direction of the grantors, and divide the proceeds, as above mentioned. Blair accepted the trust, and several parcels were conveyed to different persons under it, until, in February, 1892, about one hundred and eighty-eight acres were left. The matters in controversy in this suit grow out of transactions regarding this tract, beginning in February, 1892. A suit was instituted by the trustees of said college in the United States Court, and considerable testimony taken therein when the cause was dismissed for want of jurisdiction, and, by agreement, the evidence taken was allowed to be read in the circuit court of Doddridge County, where the suit was instituted by the college trustees against J. V. Blair and others. The facts which give rise to this litigation grow out of the circumstances surrounding the sale of said residue of land by Blair, trustee. Up to the date of sale, no oil had been found in that vicinity, although great amounts of money had been expended exploring for same.

At the time this suit commenced, Gains had died, and Henry Ash, as sheriff, had been appointed his administrator, and represented the Gains estate in the proceeds arising from sales of this land. F. E. Burton, a lawyer, of Cleveland, Ohio, represented the interests of Oberlin College. F. K. Knight, a former clerk of the county court represented one-fourth of the proceeds. The bill charges that on February 18, 1892, Blair wrote to Burton and the board of trustees of the college that he had received an offer of seven dollars per acre for the land, and induced them to authorize a sale at the price, when, in fact, he was conspiring with Ash and McMillan and Percy to get the property, and thus obtained assent to the sale. The letter did not disclose that the person who made the offer was Wilkinson, an agent of the South Penn Oil Company. Blair conveyed the land at seven dollars to McMillan, for the real benefit of himself and his associates, on February 23rd, and practiced a fraud on the beneficiaries, Ash being Gains' administrator. The bill further charges that McMillan, in March, leased said land to the South Penn Oil Company for a bonus of five thousand, five hundred dollars, and afterwards received rentals and royalties in large amounts; that McMillan, Ash, Blair, and Percy were advised of the value of the land as oil property, and the college, as well as said

Knight, was defrauded; and the bill prayed an injunction, the appointment of a receiver, and the cancellation of everything except the lease to the oil company. Answers were filed putting in issue the allegations of the bill, and many depositions taken. On December 3, 1896, a final decree was rendered, holding that the deed from Blair, trustee, to McMillan, dated February 23, 1892, conveying one hundred and eighty-two and seven-eighths acres to McMillan, was procured under such circumstances as not to divest the rights of the beneficiaries, the Board of Trustees of Oberlin College, and the widow and heirs of Gains, deceased, under the trust deed executed to Blair; confirmed the lease made by McMillan to the South Penn Oil Company; and decreed that McMillan be declared to be holding the legal title of the land conveyed to him by said Blair, trustee for said college, for the widow and heirs, and their assigns, grantees, and personal representatives, of C. R. Gains, in their proportion and upon the terms, conditions, etc., contained in the deed of trust made by complainant to Blair on September 19, 1885, and in the deed of trust made to Blair by Gains and Knight, on January 13, 1896,—that is to say, in the proportion of one-half undivided interest therein to the complainant and one-fourth undivided interest therein to said widow and heirs and their assigns; but, inasmuch as said Knight had entered no appearance and asked for no affirmative relief in the cause decreed as to the original one-fourth undivided interest held by him in said land under the trust invested in the said Blair, trustee, said McMillan holds such interest in trust for Knight and himself, and said Blair, Ash, and L. W. Percy's estate, in proportion of one-fifth of the whole estate to said Knight, and one-eightieth interest each in the whole to Blair, McMillan, Ash, and the estate of L. W. Percy, deceased, and upon the terms of the deed from Blair, trustee, to McMillan, and of the contract between Blair and others and McMillan, set forth in the bill and proceedings, to direct how the oil parties should account to the parties aforesaid for royalty when the receiver was discharged and the cause finally determined; perpetuated the injunction against McMillan, etc., their agents, etc.; and directed that Blair, Ash and the McMillan estate should be required to account as trustees to the complainant, and to the widow

and heirs, the grantees and assigns, and the administrator of the estate of C. R. Gains, deceased, according to their respective rights and interests, for the amount of bonus received, and the rent aforesaid, and all other rents received or which may be received, subject to the credit of proportionate amount of the purchase money paid by McMillan to Blair, trustee, and any proper charges for taxes or otherwise chargeable against said land; and from this decree S. B. McMillan, Henry Ash, and Jackson V. Blair obtained this appeal.

The litigation in this case is manifestly the result of a train of circumstances which not infrequently occurs in this State of late years, when a few acres of barren, unproductive hill land becomes suddenly of immense value, by reason of the discovery of petroleum in the immediate vicinity, and the former owner finds he has been too hasty in parting with his title, and seeks some loophole by which he regain his possessions. The circumstances relied upon by the complainant to establish the fraud relied on to invalidate the sale made by Blair, trustee, to McMillan, of the land in controversy, are contained in a small compass, and cluster around the sale made in February, 1892. On the 15th of February, McMillan and Percy saw Blair, and proposed to buy the land, which had been held at five dollars per acre. Blair told them that he understood that one dollar bonus was being paid, and that he would not recommend a sale at less than six dollars. This they agreed to pay, and Blair promised to report the offer, but neglected to do so; which failure does not comport well with the claim of plaintiff that he meant to conspire with these parties. On February 18th, Wilkinson offered Blair seven dollars, limiting his offer until Saturday, as Blair says, Wilkinson denies the limit of time, but admits that he was to get his answer on that day. On the evening of the 18th, Blair informed Knight and Ash of Wilkinson's offer, and wrote the following letter to F. E. Burton, attorney for plaintiff, which he read to Ash, as representative of the Gains estate, and Knight: "West Union, W. Va., Feb. 18, 1892. Hon. F. E. Burton and the Board of Trustees of Oberlin College, Cleveland, Ohio—Dear Sir: I have been offered seven dollars (\$7.00) an acre for the residue of 'Spy Run' lands held by me as trustee, etc. This is \$2.00 more than we had offered it at hereto-

fore. The rise in price is owing to the fact that an oil well is going down at or just below Centre Point, a mile and a half of this land; and I'm informed that the drill has gone through the 'Big Injun' in which salt water and gas were only found, but the operators are going onto the Gordon. Four other holes have gone down in this vicinity, and said to be 'dry.' The other parties in interest, Knight and the representatives of Gains' estate, say close up at once, as the 'little boom' may only last a few days. So, if you will wire me or write your approval, I can close up the sale by deed Saturday, as the bid is only given until that time, at which time I have agreed to make conveyance with your approval. This offer is on all the balance of the land outside of the part held and claimed by Wm. E. George, as shown on the plat made for me by Sherwood & Co., of which I presume you have a copy, as I sent it to you for that purpose. Taking the George part out, will leave about 182 to 188 acres, for which I am offered the \$7.00 per acre, and which I deem best to take, as the land itself, is not worth over \$5.00 per acre. Write if you get this in time; if not, wire me, using Central office at once, and oblige, yours, very truly, J. V. Blair, Trustee." Now, while Wilkinson in his testimony denies the limit of time, yet it appears that he called on Blair on the 20th, and says he was to give his answer on that day, but that Blair had not yet received an answer from Burton. The above letter reached Burton on Saturday, February 20th, and he wired Blair to sell at seven dollars. This message was received by mail at 6 o'clock in the evening, when Wilkinson was gone. On the same day it appears that McMillan and Percy called upon Blair, and asked if he had heard from Burton in regard to their offer of six dollars, made on the 15th, and were informed that he had failed to submit it, and had subsequently received the offer of seven dollars from Wilkinson, which he had submitted, and upon which he was expecting an answer. After the telegram was received from Burton, and Wilkinson was gone, and, as Blair understood it, Wilkinson's limit had expired, McMillan agreed to take the property at seven dollars, the same Wilkinson offered. He had not reported the name of the purchaser to Burton, and, if he had, it would not have been material, as he was authorized to sell at seven dollars,

and did sell it to McMillan at that price; but, before doing so, he explained the situation to Ash and Knight, and obtained their consent to convey to McMillan. The fact that neither McMillan nor Ash were advised as to the finding of oil in the Sullivan well, or in the immediate vicinity, is shown by a transaction which occurred on the 22d of February, when McMillan leased four hundred and fifty acres of land in that neighborhood to the South Penn Oil Company at one dollar per acre, and Ash, the same day, sold leases covering one thousand four hundred and forty-one acres for less than one dollar per acre. On the 23d of February, Blair conveyed to McMillan at seven dollars per acre. On the 26th he settled with the beneficiaries, and on the 29th McMillan sold to Blair, Percy, and Knight, one-fifth each, at cost price, and Knight leased his one-fifth interest to Ash. Now, if McMillan had attached any particular value to his land by reason of its containing oil or other mineral, how can we reconcile such knowledge with the fact that he parted with four-fifths at the same price he gave for it? And Knight certainly knew nothing of the oil value of the land, or he would not have released to Ash. Did Blair conspire with McMillan and the others to defraud the complainant? If such had been his intention, would he have failed to submit the offer to Percy, etc., for six dollars, and sought to have obtained a higher price from Wilkinson, if he were conspiring with others to cheat the Oberlin people, and was to share in the purchase? His interest surely would have directed him to buy at the lower figure. Again, if he knew the value of the property, his interest would have prompted him to secure more than one-fifth. The letter to Burton, advising him of Wilkinson's bid, was read to Knight and Ash, and they approved of it, and agreed the opportunity for selling at seven dollars should not be allowed to slip. Until February 18th, Blair, Knight and Wilkinson were seeking to sell to Wilkinson, and in that sale, of course, Blair was interested only to the extent of his commissions. Blair concealed nothing in his letter to Burton. He says an oil well "is going down at or below Centre Point, a mile or a mile and a half from this land," etc. The others interested, Knight and the representatives of the Gains estate, say close up at once, as the 'little boom' may only last a few days." Knight admits that this

letter was shown to him, and he assented to it. It could not have been written with any expectation of selling to Mcmillan, and, if Wilkinson had remained until the telegram came from Burton, he undoubtedly would have become the purchaser. Now, it is apparent that Burton, Knight, and the representatives of Gains were willing to sell at seven dollars per acre. Burton asked no questions as to the purchaser. He thought it best his client should sell at seven dollars. On February 23d, in pursuance of a telegram from Burton, Blair sold and conveyed to McMillan at seven dollars. On the 29th, though Knight says he never consented to the sale of his one-fourth interest to McMillan, yet, after the conveyance to McMillan, he took from him one-fifth interest in the property, instead of holding one-fourth. The sale was made to McMillan, and on the 26th Blair settled with Burton and the other fiduciaries. Now, where is the fraud which was perpetrated on Burton or his clients? They received what they were willing to sell for, and, if Blair saw proper afterwards to buy one-fifth interest in the property, it is difficult to discover why Mr. Burton or his clients should complain. On February 27th he wrote: "Your favor of 26th inst., inclosing check for \$616.21, is at hand. Please acknowledge thanks for same. We are particularly anxious to have this paid at this time."

At the time of the sale to McMillan, so far as the evidence discloses, no one was aware of the existence of oil in the Sullivan well, except the immediate employes of the South Penn Oil Company. On February 22d, Ash and McMillan were ignorant of the existence of oil in that well, or they would not have leased for one dollar per acre or less. Wilkinson had taken particular pains to spread the report that there was only salt water and gas there. After the sale had been made to McMillan, with the consent of all, the deed was made, and purchase money paid, the property was McMillan's to do with as he pleased. He could sell to Blair or any one able to purchase it. So, in the case of *Robertson v. Chapman*, 152 U. S. 683 (14 Sup. Ct. 745) Mr. Justice Harlan, delivering the opinion of the Court, said: "A real *bona fide* sale of the property through the agency of Polk, and upon terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent

and his purchase of the property from the plaintiff's vendee." It appears in that case that Mr. Polk wrote to Robinson as follow: "A man by the name of O'Donahoe says he will give \$4,000 for that property,—\$1,000 cash, balance in three equal payments, at 7 per cent., secured by mortgage on that together with mortgage on other property, so that security will be ample. Not long ago he offered \$4,000 cash, but times are dull here now, and he says the time payment is the best he will do." To this letter Robinson replied in a day or so: "I am decidedly of the opinion that the property in your city should be sold, and that, too, at once. I think the offer a fair one, and you are authorized to accept the same. Please send me the mortgage and notes as soon as consummated." Polk sold to O'Donahoe, and received cash payment. Robinson made the deed to O'Donahoe, and took mortgage to secure deferred payments. After O'Donahoe sold and conveyed the property to Polk, and the court in its opinion says: "So, that at the time Polk took the property from O'Donahoe, it was not in the power of the plaintiff (Robertson) or of O'Donahoe to rescind the contract between themselves, and Polk's agency for the sale of the property had in every material sense terminated." Again, in the case of *Walker v. Carrington*, 74 Ill. 446 (Syl. point 8), the court held that, "while it is true that a trustee or agent cannot be interested in a sale made by himself, yet when he has fully discharged his trust, and sold property to a third person in good faith, having no interest in the same at the time, he may afterwards acquire the title from the purchaser, and such fact, or the fact that his wife acquire the title, will not afford ground for avoiding his sale." We find the law thus stated in *Walker v. Derby*, 5 Biss. 134, (Fed. Cas. No. 17,068, Syl. point 3): "The agency of a real estate agent and his duty to his principal ceases upon the delivery of the title papers and payment of the property." Also point 4: "After the termination of the agency, the agents have the same right as any other persons to deal in the property." When we revert to the immediate circumstances surrounding this transaction, and seek among them for the motives that actuated Blair when he wrote this letter to Burton, it is found that he did not act alone in making the representations therein contained. Knight testifies that he had no understanding that he

was to get any interest if the land were sold to Wilkinson. He also states that he and Ash were present in Blair's office when this letter was written; and Ash says that Blair took the letter out of his copy press, and read it over to Knight and himself, and all concurred in it. When this letter is read through it bears none of the marks of fraud. It conceals nothing in regard to the efforts being made in the immediate neighborhood to discover oil, but states them frankly, and assigns them as a reason for the two dollars per acre advance in the price. It also states truly that the other parties in interest, who were there on the ground, said: "Close up at once, as the 'little boom' might only last a few days." He was then expecting to sell to Wilkinson, and no one contends that Blair could ever have acquired any interest if Wilkinson, the agent of the South Penn Oil Company, had got it. This letter was approved by Knight and Ash. None of them thought they should lose the opportunity of selling at seven dollars; and so, when Wilkinson's limitation was out, and McMillan offered to take it at Wilkinson's bid, Knight and Ash directed Blair to sell to McMillan. Burton asked no questions as to the purchaser; all he seemed to care for was the seven dollars per acre, which he got. It was sold in strict pursuance of his directions, and we cannot say from the evidence, that Blair had any understanding or agreement with McMillan before the sale was made that he was to become the owner of any interest after it was sold to McMillan. After the sale, the entire purchase money was paid to the parties entitled thereto, Burton receiving one-half and Knight one-fourth. Knight afterwards bought back a one-fifth interest, which he leased to Ash, and he swears in his testimony that, as late as the last of March, he had no idea that there was oil on the land, otherwise he would not have leased to Ash. Blair conveyed the property to McMillan on the 23d day of February. On the 29th, Blair purchased from McMillan a one-fifth interest; and Percy, Ash, and Knight each also took one-fifth. But there is no evidence in the case that Blair contemplated becoming interested in the property at the time he made the sale to McMillan.

Upon this question of fraud this Court held, in the case of *Arden v. Wagner*, 25 W. Va. 356, that "the *onus probandi* is on him who alleges fraud, and, if the fraud is not strict-

ly and clearly proved, as it is alleged, relief cannot be granted, although the party against whom relief is sought may not have been perfectly clear in his dealings." Again, in the case of *Wood v. Harrison*, 41 W. Va. 386, (23 S. E. 563), this Court, speaking through JUDGE BRANNON said: "We cannot convict her of fraud, without evidence, though she be the debtor's widow. Fraud must be proven; it cannot be presumed. Though wife, she is entitled, in a court of justice, to hold the defense of a purchaser, unless fraud is fixed upon her." In the case of *U. S. v. Hancock*, 133 U. S. 193, (10 Sup. Ct. 264,) speaking of the evidence of fraud, Brewer, Judge, said: "Not only are not they the clear, convincing, unambiguous proofs of fraud required to set aside a patent, as declared by this Court in the case of *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, (8 Sup. Ct. 131,) but all combined create nothing more than a suspicion. They may leave a doubt, but they do not bring the assurance of certain wrongs." Again, in *Baltzer v. Railroad Co.*, 115 U. S. 634, (6 Sup. Ct. 216,) it was held that, to entitle a plaintiff to relief in equity on the ground of mistake or fraud, the mistake or fraud must be clearly established. And in *Farrar v. Churchill*, 135 U. S. 609, 615, (10 Sup. Ct. 773,) Chief Justice Fuller says: "The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed, and, where it is alleged, the facts sustaining it must be clearly made out." Now, what was it Blair knew that he did not impart to Burton?

The evidence clearly shows that the existence of oil in the Sullivan land was not concealed by Wilkinson, but he told everyone that they had found nothing but gas and salt water. That McMillan and Ash knew nothing of the existence of oil in the Sullivan land is shown by the fact above stated, that, on February 22d, they parted with the oil interest in their lands, amounting to one thousand, eight hundred acres, at one dollar per acre; and McMillan would not have parted with four-fifths of this one hundred and eighty-two acre tract at the same price he paid if he had known its value. Again, Mr. Burton, when asked as a witness, what it was that Mr. Blair ought to have told him and did not, could only say that Mr. Blair failed to mention his own possessed share in the purchase. There is no evidence in the case to show that Blair intended to pur-

chase when he wrote Burton. On the contrary, the testimony shows that he expected them to sell to Wilkinson, and, looking at the entire testimony, we can find no misrepresentation made or fraud practiced upon the plaintiff, and must hold that the evidence does not establish that the defendant Blair in any manner violated the trust imposed in him. The decree complained of is, therefore, reversed, and the plaintiff's bill dismissed.

ON RE-HEARING.

After carefully considering the petition for rehearing in this case, and the arguments advanced in the support of the same, I have been unable to reach a different conclusion from the one announced in the above opinion, which was handed down on the 20th of April, 1898, and from which a rehearing was granted on the 6th of May, 1898. I now adopt said opinion, and would add nothing thereto, but for the fact that counsel seem to consider that the questions raised by the answer and cross bill of the widow and the heirs at law of C. R. Gains, deceased, have not been given the attention to which they are entitled. As stated in the above opinion, at the time this suit was brought C. R. Gains was dead, and Henry Ash, as sheriff, had been appointed his administrator, and represented the Gains estate in the proceeds arising from the sale of this land. It appears that the land in controversy was conveyed to J. V. Blair, trustee, as the result of a compromise made July 24, 1885. This tract and some other lands had been held jointly by the board of trustees of Oberlin College, F. K. Knight and C. R. Gains, the first named owning one-half and the other two one-fourth each; and they agreed to convey it to said Blair, trustee, to sell and convey, by deed, said land, under the directions of the grantors, and said trustee was to divide the proceeds among the grantors in the proportion of their respective interests therein, after paying the expense of the trust. The land was sold under the direction of the plaintiffs, the administrator of C. R. Gains, and F. K. Knight. It is claimed for the Gains estate that Henry Ash, administrator, had no right to consent to the sale made by Trustee Blair. The land, however, was articted to be sold, and at the time of the sale

must be regarded as personalty, and, being personalty, it was one of the duties of the administration to deal with it. On this question, we find the law stated in 2 Story, Eq. Jur. § 1212, where it is said: "Another class of cases illustrating the doctrine of implied trusts is that which embraces what is commonly called the equitable conversion of property. By this is meant an implied or equitable change of property from real to personal or from personal to real, so that each is considered transferable, transmissible, and descendible, according to its new character, as it arises out of the contracts or other acts or intentions of the parties. This change is a mere consequence of the common doctrine of courts of equity, that where things are agreed to be done they are to be treated for many purposes as if they were actually done. * * * Land articted to be sold and turned into money, is reputed money, and money articted or bequeathed to be invested in land is ordinarily deemed to be land." See *Turner v. Davis*, 41 Ark. 270, a very similar case to the one under consideration, in which there was litigation among heirs as to a tract of land, and, by agreement, it was conveyed to a trustee to be sold, and the proceeds divided, and it was held to be personalty. See, also, *Zane v. Sawtell*, 11 W. Va. 43.

As to the time when the conversion takes place *inter vivos*, Pomeroy, in his Equity Jurisprudence (section 1162, vol. 3, says: "Subject to this general modification, the rule is settled that the conversion takes place in wills as from the death of the testator, and in deeds and other instruments *inter vivos* as from the date of their execution." In the case of *Zane v. Sawtell*, *supra*, James W. Zane and wife conveyed to a trustee certain lots, "in trust that he should sell and dispose of said lots as occasion might fairly offer," etc.; and GREEN, JUDGE, in delivering the opinion in that case, said: "Unquestionably the deed of James W. Zane and wife, in the view of a court of equity, impressed on these twenty-one lots the character of personalty, and upon his death his interest in these lots would have passed to his personal representatives as personalty, and not to his heirs as realty. This is a sequence of the familiar principle that a court of equity regards land deeded or devised to be sold and converted into money, either articted or bequeathed, to be invested in land, as having the charac-

ter of the property into which it is to be converted, though the actual conversion by sale or purchase has not been actually effected,"—citing *Harcum's Adm'r v. Hudnall*, 14 Grat. 369, and numerous other authorities, among them *Craig v. Leslie*, 3 Wheat. 563, which is regarded as a leading case on the question. The same principle is announced in the case of *Ropp v. Minor*, 33 Grat. 109; *Effinger v. Hall*, 81 Va. 107. Authorities might be multiplied in support of this proposition, but these are deemed sufficient, when applied to the facts of the case, to lead to the conclusion that the conveyance made to J. V. Blair of the land in controversy converted the same into personalty, and, as such, it devolved upon Henry Ash, as administrator of the estate of C. R. Gains, to direct the sale of said tract of land, and receive and administer the proceeds as part of the personal estate of his intestate. I hold now, upon a review of the entire case, as I held in the above opinion, that the decree complained of must be reversed and the bill dismissed.

Reversed.

CHARLESTON.

BROWN v. BOARD OF ELECTION CANVASSERS OF RANDOLPH
COUNTY.

Submitted December 14, 1898—Decided February 4, 1899.

PROHIBITION — *Board of Canvassers—County Seat Election.*

When a board of election canvassers assume jurisdiction, which it has not, to canvass and declare the result of a vote upon the relocation of a county seat, prohibition will lie to restrain it, though, in its proper action, its functions are ministerial, and not subject to prohibition. (p. 827.)

Application of T. P. R. Brown for a writ of prohibition against the board of election canvassers of Randolph County.

Writ Granted.

D. C. WESTENHAVER, E. A. CUNNINGHAM and L. D. & J. F. STRADER, for petitioner.

C. WOOD DAILEY and JOHN H. HOLT, for respondents.

BRANNON, JUDGE:

T. P. R. Brown obtained from this Court a rule against certain persons, who constitute the board of election canvassers of Randolph County, to show cause why a writ of prohibition should not be awarded him to prohibit that board from exercising jurisdiction to canvass the returns and declare the result of a vote upon the question of the relocation of the county seat. We think that the board, though a mere ministerial body, is yet one organized and performing public functions under law, and such a tribunal as may be kept within the legal bounds of its jurisdiction by

45	826
47	818
45	826
49	738
45	826
58	876

prohibition. This seems to be conceded. *Fleming v. Commissioners*, 31 W. Va. 608, (8 S. E. 267); *Alderson v. Commissioners*, 31 W. Va. 637, (8 S. E. 274); *Brazie v. Commissioners*, 25 W. Va. 213. We award the prohibition for the reason that the canvassers have no jurisdiction to act in the matter of this vote. It belongs to the county court. Reasons for this conclusion are given in *Brown v. County Court*, 45 W. Va. 727 (32 S. E. 165), this day decided.

Writ Granted.

CHARLESTON.

BROWN v. RANDOLPH COUNTY COURT.

Submitted December 14, 1898—Decided Feb. 4, 1899.

1. COUNTY SEAT ELECTION—*Contest.*

A voter or taxpayer of a county may contest before the county court, for any legal cause, a vote upon the relocation of a county seat. (p. 835)

2. COUNTY SEAT ELECTION—*Canvass of Vote—Board of Canvassers—County Court,*

Returns of a vote on relocation of a county seat, taken at either a general or special election, must be canvassed, and the result declared by the county court, not by the board of canvassers. (p. 829).

45	827
45	827
45	827
546	717
45	827
49	738
45	827
55	210
45	827
56	13
57	227
45	827
183	545

3. STATUTES—*Construction of Statutes.*

In construing a statute which revises a former one, and the meaning of the former one was settled either by clear expressions in it or by adjudication upon it, mere change of phraseology will not be construed to be change of the law, unless it evidently purports an intention in the legislature to work a change. (p.834.)

Application by T. P. R. Brown for a writ of *Mandamus* against the Randolph County Court.

Writ Granted.

D. C. WESTENHAVER, E. A. CUNNINGHAM and L. D. & J. F. STRATER, for petitioner.

C. WOOD DAILEY and JOHN H. HOLT, for respondent.

BRANNON, JUDGE:

At the general election in November, 1898, the voters of Randolph County voted upon the question of the removal of its county seat from Beverly to Elkins, and when the commissioners of the county court met as a board of canvassers to canvass the returns of the election for Governor and other officers, C. H. Scott, John T. Davis, and W. G. Wilson, voters and taxpayers of the county, appeared before that board, and moved it to take up the certificates sent from the voting precincts as the vote upon the question, and declare the result; and T. P. R. Brown, a voter and taxpayer, objected, but the board overruled his objection, and proceeded to open the certificates, when Brown asked a recount of the ballots, and asked that he be allowed to go behind the returns apparent from the certificates, and offer evidence to set aside the election for fraud, and to exclude certain precincts for fraud. The matter having been postponed till the completion of the canvass as to the election as to officers, on a later day Brown objected to any canvass by the canvassers of the vote on the removal of the county seat, and asked that the certificates as to it be transferred to the county court, insisting that it alone had jurisdiction to ascertain and declare the result of this vote, and not the board of canvassers; while Scott and others insisted that the canvassers ascertain and declare the result from the certificates, without recount of ballots, and without going behind the certificates, and

hearing evidence of fraud in the election. The board decided that it had jurisdiction to canvass the returns and recount the ballots, but no further; and that, if asked then to hear evidence upon the fairness and legality of the election, it would transfer the controversy to the county court, in order that that court might determine it and declare the result. Both sides excepted to this action. When, later, the county court met in regular session, Brown asked it to take up the returns of the election upon this question, and canvass them, recount ballots, and hear evidence as to the fairness and validity of the election, and ascertain and declare the result; but it refused. Brown has obtained from this Court a *mandamus nisi*, and now asks that a peremptory *mandamus* be awarded compelling the county court to exercise jurisdiction, and take up the returns, recount the ballots, hear evidence of fraud, and ascertain and declare the result of the election. We must determine whether this peremptory *mandamus* shall issue. Scott, Davis, and Wilson, upon a *mandamus nisi* obtained from this Court, and a peremptory *mandamus* to compel the board of canvassers to simply declare the result of the election from the certificates. We must determine whether this *mandamus* shall issue. Brown also obtained from this Court a rule against the board of canvassers to show cause why a writ of prohibition shall not issue to prohibit it from any proceedings touching the canvass of the returns. We must decide whether this prohibition shall issue. All these proceedings involve and turn upon the same questions of law.

The sole question in this litigation is, which body shall canvass the returns of a vote at a general election upon the relocation of a county seat,—the county court as such or the board of canvassers as such? Though these bodies are composed of the same persons,—county commissioners,—yet they are in law not the same, but distinct bodies. The board of canvassers is merely a body to canvass the returns of elections for public officers, acting simply on the certificates sent from voting precincts by certain officers holding the election, and recounting ballots when demand is made. They may send for those precinct officers to ascertain the true result; but they hear no contests judicially, no evidence of fraud in the election. They act

ministerially only. If any candidate claims that the election is fraudulent or in any wise illegal, or that ballots are unlawfully counted against him, or not counted for him, he must get relief by contest, as provided in the statute *Brazie v. Commissioners*, 25 W. Va. 213. But a county court, as such, canvassing the returns of an election upon a vote upon a county-seat relocation, is an entirely different tribunal, having wider function. It canvasses the returns upon the certificates, can recount ballots, hear evidence of fraud and illegality, and do what in the case of candidates for office can be done by that court in hearing a contest. *Poteet v. Commissioners*, 30 W. Va. 58, (3 S. E. 97). And that case, as also *Welch v. County Court*, 29 W. Va. 63, (1 S. E. 337), held that returns of elections on a county seat must go before the county court to be canvassed, and to have the result declared, and not before the board of canvassers. Such was the law under chapter 5, section 15, Acts 1881 (Code 1887, c. 39, s. 15), as settled by those two cases. But it is insisted by Scott and others that all this has been changed by chapter 37, Acts 1895 (Code 1891, c. 39, s. 15). Scott contends that under this act of 1895, the board of canvassers must canvass the returns of such vote, if at a general election, simply by the certificates sent from the precincts, and declare the result of the vote; and that the county court has nothing to do with such canvass and declaration. If the election is a special one on the question, it is conceded that the county court makes the canvass and declaration. I do not concur in this position. If we look back through the entire life of the State, we find under the Constitution of 1863 the board of supervisors, and under that of 1872 the county court, and under the amendment in 1879, of Art. VIII. the county court, were given "superintendence and administration of the internal police and fiscal affairs of their counties." The location of a county seat falls under this head. If we look at the legislation upon this subject in all this time, we find that it gave the supervisors and the county courts jurisdiction to entertain petitions for the removal of the county seats, and to order votes thereon, and to ascertain and declare their results. Acts passed in 1863, 1868, 1873, and 1881 show this. It was fit, under these Constitutions, that the whole proceeding as to ordering

vote upon the question of removal of a county seat, ascertaining its result, and then providing a court house and other buildings at the new county seat, should be committed to the county court. It might be questioned whether this power could be given to other hands. It requires plain legislation, not merely doubtful construction, to revolutionize this policy, established so long. The act of 1891 is made to do so by implication only, the chief point to sustain such implication being the omission to provide, as former acts did, that the clerk should lay the returns of a general election before the county court. Let us look at the act.

The controlling reason for its enactment was to authorize, for the first time, a special election upon the relocation of a county seat. I see no other great change. Under it the petition for a vote on relocation must go to the county court. It alone could order a vote, and make all provisions necessary for it up to the election. How after the election? It says: "The said vote shall be taken, superintended, conducted and returned in the same manner and by the same officers as elections for county and state officers. If said election be held at a general election, the commissioners of election shall make out and sign a separate certificate of the result of said vote, and deliver the same to the clerk of the county court within the same time they are required by law to deliver the certificates of the result of the election of officers held by them. And if said election be held at a special election, then said county court shall at the session at which the election is ordered, appoint three commissioners of that election for each voting place in said county, who shall ascertain and certify the result of such election in the same manner as herein provided to be done at a general election. And the certificates of the result of such special election shall be laid before the court by the clerk thereof, at a special session thereof, which shall be held within five days (Sundays excepted) after said special election. Said court shall thereupon ascertain and declare the result of said vote and enter the same of record." Here we observe an aim at similarity of procedure in general and special elections, as far as possible. In words it requires the returns of a special election to go before the county court for canvass and declaration of result. Why

should it be different in the case of a general election? Is it because there are canvassers after a general election to canvass as to candidates, and none at a special election, and that convenience requires that they canvass as to both candidates and relocation? This idea is of slight force. The county court is in existence, and it makes no speed to have the canvassers act, as removal cannot occur until the county court orders it, as the act shows. This act requires separate certificates as to this election from those as to candidates. Why? Because they go for action before different bodies. If the canvassers are to declare the result, why the separate certificates? And then the unreasonableness of making such a difference between a special and general election. What calls for it? But it is urged that former acts provided, as to the certificates at general elections, that "said clerk shall lay the same before the county court at its next session," whereas the act of 1891 omits this provision as to a general election, but retains it as to a special election. If this does not sustain the theory that only the canvassers can act, no other provision does. This clause may be dispensed with entirely without affecting the power of the county court, for the act requires the election officers to make certificates and deliver them to the clerk in the case of general and special elections. For what purpose? Plainly that he may lay them before the court, for there is the clause saying: "Said court shall thereupon ascertain and declare the result of said vote, and enter the same of record." This clause applies to both general and special elections. On what can the court act but on those certificates? The law intends them in both elections for their action. They are sent to the court, because sent to their clerk. His custody of them is the custody of the court. Why say that the clerk shall lay them before the court? If it is said that the fact that it requires the clerk to lay the certificates before the court in a special election excludes the idea that he is to do so also in the case of a general election, I answer this is at most only an implication, and that, if it had been the intention to have the clerk lay them before the board of canvassers sitting, not under th's act, but under chapter 3, section 68, Code,—a body not mentioned in this act,—we should reasonably expect, if this sharp distinction was in the brain

of the legislature, that it would have said so in words. Scott's counsel contends that, as these certificates are not directed to be laid before the county court, they must go somewhere, and they go before the canvassers. I answer that this act does not say so, but, to the reverse, leaves the fair strong inference that they go before the court; and I answer, further, that they don't go before the canvassers under section 68, chapter 3, because that in terms is limited to a canvass as to candidates for office, and never mentions the canvass of returns to remove a county seat, and confers no power on the canvassers as to that. The form of declaration of result gives a place for every candidate "for office," but no place for a candidate for a county seat. This section knows not that such a candidate is running. Why carry these certificates to a tribunal knowing them not, whose power of attorney is silent as to them?

And now, as a telling argument, contemplate the great evil ensuing upon the construction of the act contended for. The case of *Brazie v. Commissioners*, 25 W. Va. 213, holds that canvassers have no power to go behind the returns to inquire as to fraud or illegality in the election. Thence it would follow that, if the board of canvassers act on a county-seat election, fraud would go unchallenged, and the result must be declared by the returns, however tainted by fraud. There is statutory provision for a contest given to a candidate defeated by fraud, but none in the case of a county-seat vote. If the construction of the statute contended for by Scott is given it, the result is, as JUDGE GREEN said in the *Poteet Case*, that one running for the petty office of constable has remedy against fraud, but the opponents of a fraudulent removal of a county seat—a most important matter—have none. If the act is given the construction that I contend for, we preserve the remedy laid down in the *Poteet Case*. If we give it the effect of changing the law so as to carry the returns before the board of canvassers, we ought, as a sequence, for reasons stated so well in the *Poteet Case* as a necessity, vest in that board power to go behind the returns, and hear evidence of fraud and illegality. But that would be a total change in the character of that tribunal, and counsel for Scott repudiates that result. If canvassers cannot go behind returns, then *certiorari* would not answer to meet

fraud, as the fraud could not be made to appear. It is suggested by counsel that chancery would entertain jurisdiction. Why destroy the remedy already existing to go abroad seeking a doubtful remedy, and that by mere construction of a statute by implication? In fact, equity disclaims jurisdiction in cases of contested elections. It does not overthrow elections, or try title to office, as will be seen in that late excellent work, *American & English Decisions in Equity* (volume 3, pp. 413, 437), *Alderson v. Commissioners*, 32 W. Va. 643, (9 S. E. 868). Though a vote upon removal of a county seat is not an "election" in strict sense, yet this rule of equity might apply by analogy. However, as this is not an election for office, but only on a public question, it may be that equity would take jurisdiction by injunction to prevent a county court from removing a county seat under a vote tainted with fraud. As shown by cases collected in the work just cited (page 439), this may be done; but the cases conflict. Be this as it may, it is no reason for changing the well-considered case of *Poteet v. Commissioners*, and destroying the ready remedy it gives, without very plain language from the legislature. The object is to reach the intention of the legislature. 1 Bl. Comm. 61. Is it reasonable to say that it intended to make a difference between special and general elections as to the tribunal declaring the result? Why so? Why not harmonize by committing the power to the county court in both cases? Why make a difference, especially when it destroys an essential remedy? The new law retains the feature that in both elections separate certificates shall go to the clerk, and the general clause that the county court shall declare the result, and retains the clause that the clerk shall lay the certificates before the county court, but only says so as to a special election. This is a mere inadvertence of drafting. The draftsman intended it as to both general and special elections. If he had intended them in a general election to be laid by the clerk before another body, would he not have said so? The clause that the county court shall declare the result is controlling. "Where the law antecedently to the revision was settled, either by clear expression in the statute or adjudication thereon, the mere change of phraseology shall not be deemed or construed a change of the law, unless such

phraseology evidently purports an intention in the legislature to work a change. A contrary construction might be productive of the most dangerous consequences." *Parramore v. Taylor*, Grat. 220, 243; 1 Minor Inst. 41. *Owners v. Bragdon*, 121 Grat. 685; *Vaughan v. Jones*, 23 Grat. 403. The motive of the act of 1891 was to change the old law only to the extent of allowing a vote at a special election. It was not intended to allow the county court to canvass a vote only at a special, and not at a general, one, and thus take away the citizen's right to contest an illegal vote on the removal of a county seat. Such change does not speak from the act. If the construction contended for by Scott is correct, it results in this anomaly: that a vote at a special election can be contested for fraud or other illegality, but one at a general election cannot be. This was never intended. This alone is enough to repel that construction, though other reasons supplement and fortify it. I should add the argument that the act not only requires the county court to "ascertain and declare the result of said vote," but elsewhere also says that, if three-fifths of the votes be in favor of relocation, "the said county court shall enter an order declaring the place so receiving three-fifths of all the votes cast therefor to be the county seat." Now, if the intent was that the canvassers should canvass the returns, we would look for some provision to certify from the canvassers to the county court the result of the canvass, to enable it to make such an order. There is none. Why? Because it was intended that the county court shall canvass, and as the result would be on its own record, there was no need of a certificate of the result of the canvass. If we could say, even, that the act does not provide what body shall declare the result of a vote at a general election, what then? As it is the county court that entertains the proceedings for relocation by receiving the petition for a vote, and ordering it, and the certificates from the precincts are in the custody of the clerk, we would say that it was also to declare the result, not the board of canvassers, as was held in *State v. Whitney*, 12 Wash. 420; (41 Pac. 189.)

A taxpayer or a voter of a county, merely as such, may appear before the county court, and in any legal mode contest the returns of and vote upon a relocation of a county seat for

fraud, irregularity of illegality, or other ground which in law would change the result or overthrow the vote, in whole or part. This is presented in brief of Brown's counsel, but is not contested. *Poteet v. Commissioners*, 30 W. Va. 59, (3 S. E. 97); *Welch v. County Court*, 29 W. Va. 63, (1 S. E. 337); *Hamilton v. County Court*, 38 W. Va. 76, (18 S. E. 9); *Kriecshel v. Board*, 12 Wash. 436, (41 Pac. 186).

In deference to the extended oral and printed argument of counsel, I have said too much in the case. I regard it as quite plain. From these views it follows that we must award a peremptory *mandamus* to Brown to compel the county court to take jurisdiction, and take up the returns of the vote, and canvass them, and recount the ballots, and hear evidence touching fraud and illegality in the vote, if asked, and declare the result, and enter it of record; and we must award the writ of prohibition sought by Brown against the board of canvassers prohibiting it from exercising any jurisdiction whatever over the certificates and returns of said vote, and we must refuse the *mandamus* asked by Scott, Davis, and Wilson to compel the board of canvassers to proceed with the canvass of said vote.

NOTE BY DENT, PRESIDENT:

So far as the opinion of JUDGE BRANNON holds that the county court has authority to hear and determine contests with regard to the relocation of a court house, it is undoubtedly legislation by judicial construction to supply as a matter of necessity an inadvertent omission in the statute. The same may be said of the decision in the case of *Poteet v. Commissioners*, 30 W. Va. 58, (3 S. E. 97). But to hold otherwise is to deny to the taxpayers the undoubted right to inquire into and know whether their court house has been relocated in the manner provided by law. And for this reason, though reluctant to usurp legislative functions, I concur in the proposed judicial amendments of the statute to prevent a denial of the just rights of those in interest. Judge-made law, in such an unforeseen event, is better than no law. It is at least in accord with, and preservative of, that favorite maxim of the courts of common law, founded on fiction though it be, that "there is no right without a remedy." *Charleston & S. Bridge Co., v. Kanawha County Court*, 41 W. Va., 676, (24 S. E. 1002).

Writ Granted.

CHARLESTON.

STATE v. COTTRELL.

Submitted February 4, 1899—Decided Feb. 8, 1899.

1. BURGLARY—*Indictment.*

In an indictment, a count evidently intended for burglary, which fails to charge the offense as burglariously committed, is bad, and should be quashed. *State v. Meadows*, 22 W. Va. 766. (p. 839).

2. BURGLARY—*Indictment—Housebreaking—Sentences.*

A person found guilty by the verdict of a jury, under a bad count for burglary, cannot be sentenced for housebreaking, although the indictment contain a good count charging the latter offense. (p. 837).

3. DISQUALIFICATION OF JUDGE.

It is improper for a judge to try indictment signed by him as prosecuting attorney. p. 839).

Error to Circuit Court, Ritchie County.

Richard Cottrell was convicted of burglary, and brings error.

Reversed.

P. LIPSCOMB, for plaintiff in error.

DENT, JUDGE:

Richard Cottrell was tried for a felony in the circuit court of Ritchie county, found guilty, and sentenced to two years in the penitentiary. On a writ of error to this Court he relies on the following assignments: (1) That the county in the indictment on which he was found guilty should be quashed, because it fails to use the word "burglariously";

(2) that the judge who tried the case was also the prosecuting attorney who signed the indictment.

The indictment is as follows: "The State of West Virginia, Ritchie County, to wit: In the Circuit Court of said County. The grand jurors of the State of West Virginia, in and for the body of the county of Ritchie, and now attending the said court, upon their oaths present that Richard Cottrell, on the — day of July, 1896, in said county of Ritchie, the dwelling house of one H. J. Amos there situate, in the nighttime of that day, feloniously did enter, without breaking the same, with intent the goods and chattels of the said H. J. Amos, in the said dwelling house, then and there being, feloniously did steal, take and carry away, and three pillows of the value of one dollar each, and three pillow slips of the value of twenty-five cents each, one bucket of the value of twenty-five cents, and one lamp of the value of one dollar, three table forks of the value of fifty cents each, and two chairs of the value of one dollar each, and one pepper box of the value of twenty-five cents, and one coffee mill of the value of one dollar, and three bed quilts of the value of two dollars each, of the goods and chattels of the said H. J. Amos, in the said dwelling house then and there being found, feloniously did steal, take and carry away, against the peace and dignity of the State. And the jurors aforesaid, on their oaths aforesaid, do further present that the said Richard Cottrell on the — day of July, 1896, in the said county of Ritchie, a certain other dwelling house of H. J. Amos there situate, in the daytime of that day, did feloniously break and enter, with intent the goods and chattels of the said H. J. Amos, in the said dwelling house then and there being, feloniously to steal, take, and carry away, and three pillows of the value of one dollar each, and three pillow slips of the value of twenty-five cents each, and one bucket of the value of twenty-five cents, and one lamp of the value of one dollar, and three table forks of the value of fifty cents each, and two chairs of the value of one dollar each, and one pepper box of the value of twenty-five cents, and one coffee mill of the value of one dollar, and three bed quilts of the value of two dollars each, of the goods and chattels of the said H. J. Amos in the said dwelling house then and there being found, feloniously did steal, take, and carry away, against the peace

and dignity of the state. R. H. Freer, Prosecuting Attorney." The prisoner moved to quash it, which motion was never acted upon. The jury brought in a verdict of guilty under the first count of the indictment. The prisoner moved to set it aside and in arrest of judgment. The court overruled his motion, and sentenced him to two years' confinement in the penitentiary.

The first count evidently attempts to charge burglary, but fails for want of the word "burglariously," and it therefore should have been quashed, and, the jury having found their verdict on such bad count, the judgment should have been arrested and the count quashed, for the reason that there is no punishment prescribed by the statute for the offense charged. *State v. Meadows*, 22 W. Va. 766. The court, however, presumably not desiring to quash papers prepared when holding the office of prosecuting attorney, proceeded to sentence the prisoner under the second count. For burglary the punishment is not less than five nor more than fifteen years in the penitentiary; for housebreaking, it is not less than one nor more than ten years; and for petit larceny, it is not exceeding one year in jail. The time fixed was evidently under the second count, as it could not have been under the first, nor could it have been for petit larceny. The things charged as taken were less than twenty dollars in value.

Nor is it proper for a judge to try indictments signed by him as prosecuting attorney. No prosecutor likes to quash his own papers, and his knowledge of the facts obtained while prosecutor may tend to prejudice the prisoner's right to a fair and impartial trial. Evil appearances should be avoided, that the fountain of justice may be kept pure. The judgment is reversed, the verdict set aside, the first count in the indictment is quashed, and the case remanded to be proceeded in according to law.

Reversed.



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ABSENCE OF JUSTICE. See *Justice of the Peace* 1.

ACCEPTANCE. See *Contracts* 3.

ACCEPTANCE OF NOTES. See *Mechanic's Lien* 3.

ACCEPTANCE OF SERVICE. See *Service of Process*.

ACCIDENT. *Couch v. C. & O. R. Co.* 51.

ACCRUAL OF ACTION. See *Statute of Limitations* 1.

ACKNOWLEDGEMENT. See *Corporations* 12; *Deed* 9; *Notary Public*.

ACTIONS. See *Corporations* 6

ACTS OF OFFICERS. See *Municipal Officers*.

ACTS OF THE LEGISLATURE. See *Jurisdiction of Courts*.

ADMINISTRATORS.

1. An administrator with the will annexed of a decedent who is indebted at the time of his death, and who leaves nothing with which to satisfy the same except a tract of land which has been obtained from him by fraud, to set aside which fraudulent conveyance from him a suit had been instituted by such decedent, and determined adversely to him in the circuit court, has the right to prosecute an appeal from said decree, holding that a purchaser from said fraudulent grantee, indirectly, during the pendency of such litigation, was an innocent purchaser, and entitled to hold the property. *O'Connor v. O'Connor*, 355.
2. The syllabus in the case of *Cann v. Cann*, 40 W. Va. 138, is approved. *Cann v. Cann's Heirs*, 563.

ADMISSIONS. See *Res Adjudicata* 4.

ADVERSE POSSESSION.

1. Where the claims asserted by adjoining landowners as to their respective boundaries are such as to cause an interlock, and either of the parties is in actual adverse possession of a part of the land claimed by him under his deed outside of the interlock, and the other is in actual adverse possession under color of title of the land embraced in the interlock or land in controversy, claiming under and to the limit of his deed, the latter will, in contemplation of law, be regarded as being in actual adverse possession of all the land in the interlock, not simply that actually occupied or enclosed by him. *Vintroux v. Simms*, 548.
2. If such party actually in adverse possession of the interlock under color of title retains such possession for ten years, he will be entitled to hold the same, although the other party may be in possession of his land outside of the interlock. *Id.* 549.
See *Co-Tenancy*, 3, 5.

ADVERSE TITLE.

If a person owning an adverse title to land represents such title as bad and the title of another as good, and advises innocent persons to purchase under the latter title, and they do so by reason of his representations, he, and those claiming under him, will be estopped from setting up his title adversely to such purchasers, whether it be good or bad. *Bodkin v. Arnold*, 91.

AFFIDAVIT. See *Unlawful Entry and Detainer*, 2.

AGENCY.

1. An agent must be proven to have power to do the act in question. *Grafton & G. R. Co. v. Davison*, 13.
2. The agency of a real estate agent and his duty to his principal ceases upon the delivery of the title and payment for the property. *Board of Trustees v. Blair*, 813.
3. After the termination of the agency, the agent has the same right as any other to deal in the property. *Id.*

AGISTER'S LIEN.

1. One who keeps a horse or other live stock for compensation has a lien thereon for such compensation by Code 1891, c. 100 s. 15. *Lambert v. Nicklass*, 527.
2. An innkeeper or keeper of live stock who has a lien on the property does not lose the lien by levying an attachment upon the property. *Id.*

AMBIGUITY. See *Deed* 7.

AMENDMENT OF RETURN. See *Foreign Corporations*.

ANSWER. See *Equity Pleading*; *Mandamus* 2.

APPEAL.

1. An error of the court in reaching a wrong conclusion as to facts upon the evidence is not correctible by bill of review, but by appeal. *Wethered v. Elliott*, 436.
2. The writ of *certiorari* when awarded in civil cases before justices, under sections 2, 3, chapter 110, Code, is an appellate process, designed to effect the ends of justice; and the circuit court has a large discretion in awarding the same, reviewing judgments, and granting new trials, thereunder, and unless such discretion is plainly abused, this Court cannot interfere therewith. *Michaelson v. Cautley*, 533.
3. Where adult defendants are negligent of their defense in the lower court, they cannot be heard in an appellate court. *Cann v. Cann's Heir's*, 563.
4. An objection to a bill in chancery, made for the first time in this Court, for the reason that it is not signed by counsel, will not be entertained. *Jones v. Shufflin*, 729.
See *Administrators* 1; *Bill of Review* 4; *Commissioners in Chancery* 2, 3; *Certiorari*; *Decree* 2; *Justice of the Peace* 2; *New Trial* 2; *Unlawful Entry and Detainer* 2.

APPEALABLE DECREE.

A decree which adjudicates all the principles of a cause and settles the rights of the parties, leaving nothing further to be done but execute it, is such a decree as will support an appeal from a decree which grants a rehearing of the first decree. *Deaton v. Mitchell*, 670.

APPELLATE COURT. See *Bill of Exceptions* 1; *Equity* 8.

APPEARANCE. See *Foreign Contracts* 1.

APPOINTMENT OF RECEIVERS. See *Corporations* 7.

ARGUMENT OF COUNSEL.

Counsel necessarily have great latitude in the argument of a case, and it is, of course, within the discretion of the court to restrain them; but with this discretion, the appellate court will not interfere, unless it clearly appears from the record that the rights of the prisoner were prejudiced by such line of argument. *State v. Allen*, 66.

ASSIGNMENT.

A verbal assignment of an open account in consideration of future credit and merchandise sold and delivered is a good equitable assignment, although not afterwards reduced to writing, as promised. *Kennedy v. Schilansky*, 521.
See *Chose in Action*; *Partnership* 1. 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS. See *Corporations* 9.

ASSIGNMENT OF JUDGMENT.

A writing given by a client to his attorney in a suit authorizing the attorney to retain out of the judgment, when recovered, a part for his compensation, is an assignment of such part. *Bent v. Lipscomb*, 183.

See *Attorney-at-Law*.

ASSUMPSIT.

Assumpsit will lie on a writing under seal guarantying repayment of money borrowed evidenced by borrower's bond, and secured by collateral mortgage which is to be repaid in monthly installments and payment of monthly dues on stock, and providing that, after six months' default in monthly payments, at option of the lender the principal debt shall at once become due and collectible and the mortgage foreclosed, when default has been made and mortgage foreclosed in a court of competent jurisdiction having jurisdiction of the subject-matter and parties, and a decree ascertaining the balance due after subjecting all the property embraced in the mortgage on account of the debt. If the insolvency of the principal debtor be alleged. *Middle States L. B. & C. Co. v. Engle*, 588.

ATTACHING CREDITOR. See *Garnishment*.

ATTACHMENT.

1. Property in *custodia legis* can not be attached. *Brewer v. Hulton*, 106
2. Whether the court is in session or vacation, the clerk's office is open for the purpose of commencing suits or actions by issuing process therefor, including also process of attachment under chapter 106 of the Code. *Abney v. Ohio L. & M. Co.*, 446.
See *Agister's Lien*, 2.

ATTESTATION BY CLERK. See *Bill of Exceptions* 2.

ATTORNEY AT LAW.

An attorney at law has a lien upon a judgment recovered by him for his client for his compensation, which lien is good against an assignee of the judgment, though he had no notice of the lien. *Bent v. Lipscomb*, 183.

See *Assignment of Judgment; Contracts* 1.

ATTORNEY AND CLIENT.

An attorney for a client whose property is sold at judicial sale to satisfy liens and charges against it, who notified such client prior thereto of the time and terms of sale, and of the result thereof soon after the sale and confirmation, and no objection was

ATTORNEY AND CLIENT—Continued.

made thereto by the client, the relation of attorney ceased between the parties, as to the land itself, from the confirmation of the sale, and only continued so far as such attorney might have to do with the proceeds of the sale. *Williams v. Maxwell*, 297.

ATTORNEY OF RECORD. See *Building and Loan Association* 4.

ATTORNEY'S LIEN. See *Attorney-at-Law*.

BALLOTS. See *Elections by the People* 4, 5.

BAPTIST MISSIONARY SOCIETY. See *Corporations* 13.

BILL IN EQUITY.

"The defense of the statute of limitations and laches and stale demand" being proper grounds for demurrer, a bill setting up a stale demand, without alleging any reasonable excuse for delay in the assertion thereof, should be dismissed for want of equity, unless properly amended. *Jarvis v. Martin's Admr.*, 347. See *Appeal* 4; *Mortgage* 1; *Presumption of Payment*; *Res Adjudica* 3; *Title*.

BILL OF EXCEPTIONS.

1. A bill of exceptions must be signed by the judge, else it can not be considered in the appellate court. *Adkins v. Globe Fire Ins. Co.*, 384.
2. The record entered in the law order book of a circuit court must attest that a bill of exception was executed and made part of the record, else such bill can not be considered, though inserted in the record by the clerk. (As to exceptions shown by order, where there is no bill of exceptions.) *Id.*
See *Record* 1.

BILL OF REVIEW.

1. There need be no leave of court to file a bill of review based on error of law, but such leave is necessary when the bill of review is based on newly-discovered facts. *Dunfee v. Childs*, 155.
2. Three years is the limitation for a bill of review, and five years for a motion to reverse a decree by default. (BRANNON, PRESIDENT, fixes two years for both.) *Id.*
3. A bill of review for newly-discovered evidence will not lie where the evidence is simply confirmatory or cumulative. It must be decisive in its character,—such as ought, if true, upon rehearing to produce a different decree, and of which the party was ignorant at the time of the decree, and could not have learned by the exercise of reasonable diligence. *Wethered v. Elliott*, 437.
4. When a bill of review is predicated on the sole ground of after-discovered evidence, and during the pendency of said bill of review more than two years elapse after the date of the decree

BILL OF REVIEW—Continued.

sought to be reviewed, and said bill of review is then dismissed, an appeal from the decree sought to be reviewed will be barred.

Id.

See *Appeal 1; Laches 4.*

BILL QUIA TIMET. See *Suretyship 4.*

BOARD OF CANVASSERS. See *County Seat Election 2; Mandamus 1, 3; Prohibition 2.*

BOARD OF DIRECTORS. See *Corporations 9.*

BOARD OF EDUCATION. See *Public Schools 1, 2.*

BONDS. See *Deputy Sheriff 1, 2; Municipal Corporations 4, 5; Subrogation.*

BOUNDARIES. See *Adverse Possession 1.*

BREACH OF BOND. See *Deputy Sheriff 4.*

BUILDING AND LOAN ASSOCIATION.

1. Foreign building associations legally doing business in this State have the same rights, powers, and privileges, and are subject to the same regulations, restrictions, and liabilities as domestic associations. *Archer v. Baltimore B. & L. Asso. 37.*
2. Building associations are authorized to adopt by-laws fixing a minimum premium at which to award loans to their members, such premiums to be deducted from the loans in advance or paid in periodical installments. *Id.*
3. Section 26, chapter 54, Code, in so far as it exempts building associations from the operation of the general law in relation to usury, is not unconstitutional. *Id. 38.*
4. A building and loan association chartered by the state of New York, which has complied with our statute by appointing an attorney in this State to accept service for it, does not thereby become a domestic corporation. *Savage v. People's B. L. & S. A. 275.*
5. Where a certificate of stock on its face provides that the holder may withdraw the amount paid on the same to a building and loan association, at any time within three years from its date, together with six per cent. interest, all of which are payable in the manner set forth in the articles of association and by-laws, and terms and conditions printed on the back of certificate,—the fourth of which conditions provides that “the payment on this certificate cannot be withdrawn until after three years from the date of this certificate; if withdrawn between that date and maturity, the holder shall be entitled to receive sixty dollars for each of said shares, together with six per cent per annum,”—

BUILDING AND LOAN ASS'N—Continued.

said condition and the by-laws of said association existing at the date of said certificate are a part of the contract, and the manner and time of withdrawal and payment cannot be changed by a subsequent by-law. *Id.*

BURDEN OF PROOF. See *Fraudulent Conveyance* 5, 7, 8; *Fraud* 2.

BURGLARY.

1. In an indictment, a count evidently intended for burglary, which fails to charge the offense as burglariously committed, is bad, and should be quashed. *State v. Cottrell*, 837.
2. A person found guilty by the verdict of a jury, under a bad count for burglary, cannot be sentenced for housebreaking, although the indictment contain a good count charging the latter offense. *Id.*

BY-LAWS. See *Corporations* 5.

CANVASS OF VOTE. See *County Seat Election* 2.

CENSUS. See *Constitutional Law* 1.

CERTIFICATE. See *Identity of Document*; *Notary Public*; *Recordation*.

CERTIFICATES OF ELECTION. See *Elections by the People* 4, 5; *Mandamus* 3.

CERTIORARI.

The statutory remedy of *certiorari* to judgments of justices in civil cases is merely a form of appeal. *Parsons v. Aultman Miller & Co.*, 473.

See *Appeal* 2; *Judgment* 1; *Return*; *Supreme Court of Appeals* 1.

CESTUI QUE TRUST. See *Deed* 1.

CHANGE OF VENUE. See *Equity* 9.

CHARGES ON SEPARATE ESTATE. See *Married Women* 1.

CHARTER. See *Corporations* 13.

CHATTEL MORTGAGE.

1. R. executes a deed of trust on two mules to H., trustee, to secure Y. in the sum of one hundred and sixty-five dollars. The deed is recorded in R. County, November 23, 1895, the day of its execution. The property is removed to C. County, and the deed recorded there December 5, 1895. The property is removed to F. County, and the deed recorded there November 28, 1896. On No-

CHATTEL MORTGAGE—Continued.

venber 30, 1896, action is brought by H., trustee, in detinue, for the mules, before a justice, in F. County, against C., who is in possession. At the trial the deed of trust is given in evidence, mules identified, possession is proven with C., and that one hundred dollars on the trust lien is still due and unpaid. H., the trustee, has shown superior title, and is entitled to recover, unless C. shows that he purchased the mules without notice, and for valuable consideration, without C. and R Counties, three months or more prior to the recordation of the deed. *Hundley v. Callo-way*, 516.

2. In such case, if plaintiff establish his right to recover, the measure of his damages would be the amount proved to be due and unpaid on the trust lien, for which he should have alternate judgment against the purchaser, *Id.*
See *Assumpsit*; *Guaranty*; *Mortgage* 2, 3.

CHOSE IN ACTION.

The first assignee of a chose in action has preference. *Turk v. Skiles*, 82.

CIRCUIT COURTS.

1. A term of a circuit court of one county can, if necessary, prolong its session beyond 4 o'clock p. m. of the third day of the time fixed for a term in another county. *First National Bank v. Parsons*, 688.
2. Circuit courts of different counties in the same circuit may sit at the same time. *Id.*

CLERK'S OFFICE. See *Attachment* 2.

CLOUD ON TITLE. See *Title*.

COLLATERAL ATTACK. See *Eminent Domain*.

COLOR OF TITLE. See *Adverse Possession* 1, 2.

COMMISSIONER IN CHANCERY.

1. A finding of facts by a commissioner, confirmed by the circuit court, is viewed with peculiar respect by this Court, and such finding will not be disturbed unless plainly erroneous. *Cann v. Cann's Heirs*, 563.
2. Where questions of fact are referred to and passed upon by a commissioner, and the findings of the commissioner are overruled and disaffirmed by the circuit court, the appellate court must determine for itself, from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner or that of the circuit court. *Hyre v. Lambert*, 715.
3. A case in which the appellate court, upon the facts and evidence reversed the action of the circuit court in overruling the findings

COMMISSIONER IN CHANCERY—*Continued.*

of the commissioner and in sustaining exceptions taken to the commissioner's report. *Id.*

See *Equity* 2.

COMMISSIONER'S REPORT. See *Res Adjudicata* 1.

COMPENSATION. See *Deputy Sheriff* 2, 3, 4; *Vendor and Vendee* 3.

COMPENSATION OF TEACHER. See *Public Schools* 2.

COMPETENCY OF WITNESS. See *Witness* 1, 2.

CONDITION PRECEDENT. See *Insurance*.

CONDUCT OF ELECTION. See *Municipal Corporations* 4.

CONFLICT OF EVIDENCE. See *Evidence* 6.

CONSIDERATION. See *Fraudulent Conveyance* 1, 7, 8

CONSTITUTIONAL LAW.

1. When, after a census, the Legislature has, by law, created delegate districts, and apportioned delegates for the House of Delegates among the counties and districts, section 10 of Article VI of the Constitution forbids any change until after the next census. An act making earlier change is void. *Harmison v. Ballot Commissioners*, 179.
2. Amendment 14 of the Constitution of the United States does not render our statute law allowing distress warrant for rent unconstitutional and void. *Anderson v. Henry*, 319.
3. That clause of section 6, Article XIII, of the State Constitution, forfeiting land for the failure of the owner to enter it for taxation, is not in violation of that clause of the fourteenth amendment to the federal constitution restraining states from depriving any person of life, liberty, or property without due process of law. *State v. Sponangle*, 415.
4. The fourteenth amendment to the federal constitution does not itself define "due process of law." What was such before its adoption continues such. It does not prohibit a state from future, new legislation, action, or proceedings necessary, in its judgment, in the administration of its government, so it bear alike on all similarly circumstanced, and be not unusual, oppressive, or arbitrary action, assailing the essential rights of the person. *Id.* See *Building and Loan Association* 3; *Corporations* 14; *Jurisdiction of Courts*; *Taxation* 2, 3, 4.

CONSTRUCTION. See *Order of Publication*; *Oil Lease* 1, 2, 4; *Power of Attorney*; *Statutes*; *Vendor's Lien* 1, 2.

CONSTRUCTION OF WRITING. See *Deed* 2, 3, 5.

CONTEST. See *County Seat Election* 1.

CONTESTED ELECTION.

A notice of contest as to a municipal office which shows that the contestant was the opposing candidate for such office is not fatally defective in not showing that the contestant had the requisite statutory qualifications. The statute relating to contests for county and district offices makes this a matter of defense on the part of the contestee. *Cushwa v. Lamar*, 327.

CONTINUANCE. See *Justice of the Peace* 1; *Suretyship* 3.

CONTRACTS.

1. A contract between a sheriff and a taxpayer, by which the taxpayer is to act as a sheriff's attorney at a fixed sum, to be applied on the taxpayer's taxes, is against public policy, and a court will not apply it as payment on the taxes. *Miller v. Wisener*, 59.
2. A contract to render personal services for a longer term than one year is void, under the statute of frauds, and no suit can be maintained upon the contract itself; but, after performance of the service, there may be recovery of its worth upon a *quantum meruit*. *Id.*
3. Generally, the place of the acceptance of a proposal is the place of contract. *Galloway v. Standard Fire Ins. Co.*, 237.
4. A deposit of a contract in a post office addressed to the party to whom it is to be delivered is a delivery at the post office. *Id.*
5. Where a trustee is proceeding to make sale of real estate at public auction, and R. and B., after competing as bidders for some time, enter into a verbal agreement that R. shall desist from bidding, and B. should proceed as advised from time to time, and, if B. became the purchaser, he was to divide the property purchased with R., such an agreement is a fraud upon the vendor, and, if B. refuses to comply with the agreement, it cannot be enforced. *R. Ralphsnyder v. Shaw*, 680.
6. A contract of this character is void, as being contrary to public policy.
See *Building and Loan Associations* 5; *Corporations* 1, 2; *Deputy Sheriff* 1; *Insurance* 1, 2; *Married Women* 1; *Suretyship* 2, 3, 4; *Vendor and Vendee* 1, 2, 3.

CONVERSION. See *Wills* 1, 2.

CORPORATIONS.

1. Where a party holds an option on a tract of land for which he agreed to pay six thousand dollars, with a view of organizing a joint-stock company for the purpose of drilling for oil and gas, and associated others with him to assist in soliciting subscrip-

CORPORATIONS—*Continued.*

- tions to the stock of said proposed company, and, in so doing, attached a written statement to each subscription paper, proposing to sell said tract of land to the company, when organized, at the price of eight thousand five hundred dollars and after the stock was subscribed, and the company organized, it agreed to purchase said property at said price, said party was entitled to the profit arising from the sale of land to the company. *Richardson v. Graham*, 134.
2. While a corporation can not ratify contracts made in its name or behalf before it has acquired life, it may exercise its power to make contracts when it comes into existence by accepting or adopting such contracts. *Id.*
 3. Such company being indebted to the promoter of the company for said tract of land, and said promoter being indebted to the company for stock subscribed for by him, the promoter had the right to pay for his stock by giving the company credit to that extent upon the purchase money due him for said land. *Id.*
 4. A statute merely enabling a foreign corporation to hold property or do business in this State does not make it a domestic corporation, and it may be proceeded against by attachment as a foreign corporation. *Savage v. People's B. L. & S. A.*, 275.
 5. A corporation has not the power, by laws of its own enactment, to disturb or divest rights which it has created, or to impair the obligation of its contracts, or to change its responsibility to its members, or to draw them into new and distinct relations; and all by-laws attempting to do this are inoperative and void. *Id.*
 6. A receiver, trustee, or assignee of a dissolved foreign corporation, appointed in the state of its domicile, may institute in the courts of this State suits in his own or the corporate name for debts or claims due such corporation. *Swing v. Furniture Co.*, 233; *Swing v. Veneer & Panel Co.*, 288.
 7. Circuit courts of this State are authorized by sections 58, 59, chapter 53, Code, in proper cases therein set forth, to appoint receivers for and wind up the affairs of foreign corporations who have done business, acquired property, and contracted debts in this State. The law on this subject as propounded in the case of *Nimick v. Iron Works Co.*, 25 W. Va., 184, has been superseded by chapter 39, Acts 1885. *Id.*
 8. Before a receiver or a trustee of a dissolved foreign corporation can recover on a premium note a *quasi ex parte* assessment, he must show that the conditions precedent to such recovery contained in such note have been fully satisfied. *Id.*
 9. The directors of a corporation in this State have no power to direct the assignment of the entire property owned by such corporation to a trustee for the payment of its creditors, without the consent of the stockholders. *Kyle v. Wagner*, 349.
 10. Where suit in equity is brought by certain stockholders against the directors, and such directors, the president and all the stock-

CORPORATIONS—*Continued.*

holders are before the court, it is unnecessary to make the corporation a party by name, the object of the suit being to protect the interest of the stockholders from the unauthorized acts of the directors. *Id*

11. In a suit to wind up the affairs of a defunct corporation, the stockholders are necessary parties. *Styles v. Laurel Fork O. & C. Co.*, 374.
12. A certificate of acknowledgment of a deed conveying real estate by a corporation, which fails to show that the officer or agent executing it was sworn, and deposed to the facts contained in the certificate, as required by section 5, chapter 73, Code, is fatally defective, and does not entitle such deed to be recorded. *Abney v. Ohio L. & M Co.*, 446.
13. The secretary of state will not be compelled by *mandamus* to issue a charter of incorporation to several persons who agree to become a corporation by the name of the "Baptist Missionary Society of West Virginia," for the purpose of promoting religion by aiding in the support of Baptist ministers engaged in preaching the gospel, and by aiding in the erection of houses of worship on missionary fields in West Virginia, and by collecting and disbursing funds for these purposes. *Powell v. Dawson*, 780.
14. Granting a certificate of incorporation upon the presentation of such an agreement would, in effect, be incorporating the church the parties represent, and contrary to the provisions of the Constitution and statute. *Id.*
See Order of Publication; Right of Action.

COSTS. *See Harmless Error; Judgment 6; Municipal Corporations 2; Suit to Charge Land.*

CO-TENANCY.

1. Where a co-tenant permits the common property to be sold for taxes, and directly or indirectly secures the title in his own name, his deed will be avoided at the instance of his co-tenants, or he will be held to be a trustee holding the legal title for their mutual benefit. *Parker v. Brast*, 399.
2. A purchaser of the common property from such co-tenant, with notice of the character of his title, will be limited in his holding to the actual interest of his grantor in such property. *Id.*
3. A grantor claiming the common title of the co-tenancy under a deed from one of the co-tenants is under the burden of showing some notorious act of ouster or adversary possession, which has ripened into perfect title by its unbroken continuation during the statutory period of ten years, with the full knowledge and acquiescence of the disseised co-tenants. *Id.*
4. As the possession of one co-tenant is the possession of all, laches, acquiescence, or lapse of time can not bar the right of entry of a

CO-TENANCY—*Continued.*

co-tenant until the actual disseisin has been effected by some notorious act of ouster brought home to his knowledge. *Id.*

5. The making of a deed for the whole property by a co-tenant to a stranger is not such act of ouster, unless actual adverse possession is taken thereunder. *Id.*

COUNTY CLERK. See *Recordation*.

COUNTY COURT. See *County Seat Election 2.*

COUNTY SEAT ELECTION.

1. A voter or taxpayer of a county may contest before the county court, for any legal cause, a vote upon the relocation of a county seat. *Brown v. County Court*, 827.
2. Returns of a vote on relocation of a county seat, taken at either a general or special election, must be canvassed, and the result declared by the county court, not by the board of canvassers. *Id.* See *Prohibition 2.*

COURT HOUSE.

1. When the place of holding the courts of any county has been changed to another building in the same town temporarily, under section 7, chapter 114. Code, for the reason that the court house has been destroyed, no formal ceremony or notice is necessary to authorize the holding of courts in the new court house provided upon the site of the old one, when the same is ready for occupancy and in possession of the county authorities. *State v. Staley*, 792.
2. Whenever such new court house is ready for occupancy, the reason for holding the court at such other place appointed has ceased, and the courts are properly held in the new court house. *Id.*, 793.

COURT'S DISCRETION. See *Argument of Counsel; Criminal Law*, 1, 2.

COVENANTS. See *Riparian Lands*.

CREDIBILITY OF WITNESS. See *Evidence 7.*

CREDITORS. See *Fraudulent Conveyance 4; Payment; Unrecorded Deed*.

CREDITOR'S BILL.

Though a suit be brought by one judgment creditor only, to enforce the lien of his judgment, and though it does not make other judgment creditors parties, and though it be not in terms a suit for the benefit of the plaintiff and other judgment creditors, yet the court may make it a suit for all lienors by ordering an account of all liens to be taken, or on a reference to convene lienors any

CREDITOR'S BILL—*Continued.*

may prove their liens. Upon such order to convene liens it is a suit for the benefit of all presenting liens, though no mention of such liens be made in the bill. *Dunfee v. Childs*, 155.

CRIMINAL LAW.

1. While the practice of keeping a prisoner manacled when on trial before a jury has always been held in disfavor in England, and also in this country, yet the trial court has a discretionary power therein, but a power which should not be exercised under ordinary circumstances, or in any case where the prisoner is not violent and obstreperous, or escape be threatened; and such restraint should not be imposed except in cases of immediate necessity. *State v. Allen*, 65.
2. When the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in not causing them to be removed. *Id.*
3. A prisoner indicted for felony should be present in court, and should plead in person, and the record should show that fact. *Id.*
4. When the record shows that such prisoner was led to the bar of the court in the custody of the sheriff, and "thereupon the prisoner, for plea, says that he is not guilty in manner and form as the state in her indictment against him has alleged, and of this he puts himself upon the country," it is sufficiently shown that he pleaded in person. *Id.*
5. Where the record shows that at the beginning of the trial in any day's proceedings the prisoner was set to the bar in the custody of the sheriff, it will be presumed that he was present during the proceedings in the case the whole day, although it does not show at the close of the day's proceedings that the prisoner was remanded to jail. *Id.* 66.
See *Evidence* 2, 3, 4, 5.

CUSTODIA LEGIS. See *Attachment* 1; *Executors* 2.

DAMAGES. See *Chattel Mortgage* 2; *Municipal Corporations* 8; *Negligence* 4, 5; *Couch v. C. & O. R. Co.* 51.

DATE. See *Identity of Document*

DEATH.

A person who absents himself from his home, and is unheard of by those who, had he been alive, would naturally have heard of him, for seven years, will be presumed to be dead, and treated as such in any litigation in which he is concerned, in the absence of proof to the contrary. *Bogg's Ex's v. Harper's Adm'r.*, 554.

DEATH OF MAKER. See *Deed* 2.

DEATH OF LIFE TENANT. See *Tenancy for Life* 2.

DEBTOR. See *Payment*.

DEBTOR AND CREDITOR. See *Suretyship* 2.

DECREE.

1. A decree is conclusive, as to the existence or nonexistence of every fact on which it depends, upon the parties to the suit and those claiming through them. *Bodkin v. Arnold*, 90.
2. A decree providing for the distribution and payment of money is a final decree, and subject to the statute of limitations relating to appeals, bills of review, and motions to correct nonappealable errors. *Kearfott v. Dandridge*, 673.
See *Error*; *Equity* 5; *Process* 1, 2; *Res Adjudicata* 2; *Suit to Charge Land*.

DECREE REVERSED. See *Equity* 3.

DECREE OF SALE. See *Sale of Realty*.

DEED.

1. G. conveyed by deed of general warranty to V., a tract of land, upon the following trust: "That the party of the second part, hereby agrees and covenants that he will take, hold, and stand seised of the above-described real estate to and for the only, sole and separate use, behoof, and benefit of Mary E. Green, wife of the said Charles S. Green, so that the said Charles S. Green will not sell, mortgage, charge, or incumber the same by way of anticipation or otherwise; that the said Mary E. Green shall receive the rents and profits arising from the said property, or such person or persons as the said Mary E. Green shall by her order in writing direct and appoint to receive the same, during the joint lives of the said Charles S. Green and Mary E. Green, his wife; and upon the decease of the said Charles S. Green, in case his wife should survive him, then the said Mary E. Green, his wife, shall immediately take and hold the property hereinbefore described, to her and the heirs of herself forever; and upon this further trust and confidence, that the said Mary E. Green may devise and dispose of the above-described property by her last will and testament, or by a paper in the nature of a will, as if she were a *feme sole*, and that she may otherwise dispose of the same by the consent of her trustee, and joining with him and her said husband in a conveyance of the same or any part thereof." Held, that said deed conveys to Mary E. Green an equitable estate in fee. *Bank of Berkeley Springs v. Green*, 168.
2. The rule of construction for determining whether an instrument is a will or a testamentary paper or a deed is that, if it passes a present interest, though the right to possession or enjoyment does not accrue till the death of the maker, it is a deed or contract,

DEED—*Continued.*

but, if it does not pass any interest or title whatever till his death, it is a will or testamentary paper, not a valid deed or contract. Section 5, chapter 71, Code 1891. does not change this rule. *Lauck v. Logan*, 251.

3. In determining whether an instrument is testamentary or deed or contract, courts do not allow language peculiar to either class of instrument, nor even the belief of the maker as to the character of the instrument, nor the name he gives it, to control inflexibly its construction; but, giving due weight to these circumstances, courts look further, and, weighing all the circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention of its maker. *Id.*
4. An instrument in form and name a deed of conveyance, acknowledged as such, and delivered to the grantee, whereby, for consideration of five dollars and love and affection, the grantors "do grant with general warranty" a tract of land closing with the clause, "But it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner," is a valid deed, not a testamentary paper, and confers a vested remainder on the grantee, to come into enjoyment on William Logan's death. *Id.* 252.
5. The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same, and, when this is determined, effect will be given thereto, unless to do so will violate some established rule of property. *Gibney v. Fitzsimmons*, 334.
6. Where the description consists of several parts, and some of them are incorrect, if it can be ascertained from those which are correct what was intended to be conveyed, the incorrect parts will be rejected, and the instrument be made to take effect. *Id.*
7. If the language of a deed is ambiguous, the court, in order to arrive at the intention of the parties, may look at their subsequent acts, and the manner in which the thing granted has been used and enjoyed under the grant. *Id.*
8. A deed for land by a married woman alone, as one living separate and apart from her husband, must recite that fact, as also the fact that the land is her sole and separate estate; otherwise, the deed is void. *Bennett v. Pierce*, 654.
9. A certificate of acknowledgment of a deed for real estate made by a married woman alone, as one living separate and apart from her husband, must state that it has been proven to the satisfaction of the officer that the real estate is the sole and separate property of the woman, and that she was at the date of the deed, and still is, at the date of the certificate, living separate and apart from her husband; otherwise, the deed is void. *Id.*

See *Corporations* 12; *Co-Tenancy* 3, 5; *Fraudulent Conveyance* 2,

DEED—Continued.

7, 8; *Identity of Document; Riparian Lands; Vendor and Vendee* 4.

DEED OF TRUST. See *Fraudulent Conveyance* 3, 4; *Mechanic's Lien* 4; *Vendor's Lien* 1, 2.

DEFECTIVE APPLIANCES. See *Negligence* 5.

DEFENDANTS. See *Appeal* 3.

DEFICIENCY. See *Vendor and Vendee* 1, 2, 3.

DEGREE OF CARE. See *Negligence* 3.

DELEGATE DISTRICTS. See *Constitutional Law* 1; *Jurisdiction of Courts*.

DELIVERY. See *Contracts* 4.

DELIVERY OF DEED. See *Deed* 4.

DEMAND. See *Tender* 2.

DEMURRER. See *Bill in Equity*.

DEPOSITIONS.

Depositions read in a trial at law by a jury cannot be carried out by the jury, to be considered when deliberating on the case, except by leave of court. Code c. 131, s. 12. *Graham v. Citizen's Nat. Bank*, 701.

DEPUTY SHERIFF.

1. In an action of debt upon a bond executed by a deputy sheriff to his principal, which bond, on its face, as a part of the condition, recites that said deputy is to act as such during the term of said sheriff's office, which bond is accepted by such sheriff, and such deputy proceeds to perform the duties of his office under said bond, and continues to perform said duties during the entire term of said sheriff's office, said bond must be considered as a contract between said sheriff and his deputy. *Davis v. Baker*, 455.
2. Where such action is predicated on a claim that the defendant has failed to comply with the conditions of his bond by paying over and accounting for all money which may come into his hands by virtue of his office, the defendant may prove and have allowed as a set-off against said claim, such amount as he may be entitled to for his service as such deputy, if the same are set forth and described in the bill of particulars filed with his plea. *Id.*
3. If the sheriff, during his term of office, and after said deputy has served two years, relieves him of a portion of the duties originally assigned to him, against his protest, but does not remove him,

DEPUTY SHERIFF—Continued.

and no change is then made as to the original agreement for compensation, the fact that the labors of such deputy are thus diminished will not necessarily reduce his compensation. *Id.*

4. If it appears from the evidence that such deputy, during the four years of his service, performed the portion of the duties of the office of sheriff of Jefferson County which he contracted to do, for the compensation he was to receive under the original agreement, by retaining his pay for such services out of money collected by him, he committed no breach of the conditions of his bond, as he in this manner, accounted for the money that came into his hands. *Id.*

See *Statute of Frauds* 1.

DESCRIPTION. See *Deed* 7; *Vendor and Vendee* 1.

DETINUE. See *Chattel Mortgage* 1, 2.

DEVASTAVIT. See *Executors* 4.

DIRECTING VERDICT. See *Verdict* 2.

DISCHARGE. See *Vendor's Lien* 1.

DISCOVERY.

When a party seeks to be heard in a court of equity on the ground that he is entitled to a discovery, and his bill and exhibits show that he already has information he pretends to seek by his prayer for discovery, such prayer will not entitle him to relief in equity. *Harr v. Shaffer*, 709.

DISCRIMINATION. See *Public Schools* 1, 2.

DISMISSAL. See *Bill in Equity; Unlawful Entry and Detainer* 2.

DISQUALIFICATION OF JUDGE.

It is improper for a judge to try indictment signed by him as prosecuting attorney. *State v. Cottrell*, 837.

DISSEISIN. See *Co-Tenancy* 4.

DISSOLUTION. See *Corporations* 6.

DISTRESS WARRANT.

A distress warrant, not being judicial process, need not be made returnable before a justice or court. If made returnable to the justice, it is good. *Anderson v. Henry*, 319.

See *Constitutional Law* 2; *Landlord and Tenant*.

DISTRIBUTEES' RIGHTS. See *Equity* 6.

DISTRIBUTION OF FUNDS. See *Equity* 5, 6.

DOMESTIC BUILDING AND LOAN ASSOCIATION. See *Building and Loan Association* 1.

DOMESTIC CORPORATION. See *Corporations* 4.

DUE PROCESS OF LAW.

- 1 Due process of law does not alway require judicial hearing. It does in matters of purely judicial nature, but not in matters of taxation or matters purely administrative. *State v. Sponaule*, 415.
- 2 It is with the Supreme Court of the United States to determine finally whether legislation or action under state authority is due process of law. *Id.*
3. What is due process of law? *Id.*
See *Constitutional Law* 3, 4.

DURATION OF LEASE. See *Tenancy for Life* 2.

DURATION OF TERM. See *Circuit Courts* 1.

DYNAMITE. See *Master and Servant*.

ELECTION. See *Wills* 2.

ELECTIONS BY THE PEOPLE.

1. Mere informalities of the election officers in holding, and ascertaining and declaring the result of an election, unless otherwise provided by statute, will not vitiate an election otherwise fair and impartial. *Knight v. Town of West Union*, 195.
2. A candidate asking a recount of ballots need not assign errors in the first count, or give any reason for a recount. *Hebb v. Cayton*, 578.
3. Where ballots once recounted as between candidates for one office are again sealed up, that will not debar a candidate for another office from demanding a recount as to the office for which he was a candidate. *Id.*
4. Certificates of the result of an election made by the commissioner at the precincts are *prima facie* evidence of such result. The ballots, if identified as the same cast, are primary and higher evidence; but, in order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statutes, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with. If there has been an opportunity for tampering with ballots, they lose their character as primary evidence. *Dent v. Board of Commissioners*, 750.

ELECTIONS BY THE PEOPLE—Continued.

5. If there is evidence tending to show that ballots are not sealed up after being counted by the precinct election officers, the ballots, on recount, are not the best evidence, but the result will be governed by the precinct certificates, where the certificates and the recount differ in result. *Id.*
See *Mandamus* 1.

ELECTION TO PURCHASE. See *Lease* 3.**EMINENT DOMAIN.**

Where the right of eminent domain has been exercised in behalf of a railroad company, and the land has been condemned, damages assessed and paid, and the company placed in possession of such land, the title thereby acquired, in so far as it is without reservation, becomes adverse to all other claimants of the property so condemned. Nor can such proceedings be collaterally attacked, except for fraud. *Kan., &c., R. Co. v. Glen J., &c., R. Co* 119.
See *Railroads* 2.

ENTRY FOR TAXATION. See *Tax Sales* 1, 2, 3.**ERROR.**

It is error to decree payment of purchase money before the time fixed in the contract. *Dunfee v. Childs*, 155.
See *Appeal* 1; *Instructions* 1, 3, 4; *New Trial* 2; *Remarks of Judge*.

ESTOPPEL.

When a party, with full knowledge, or least with sufficient notice or means of knowledge, of his rights, and of all material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. *Mann v. Peck*, 18.
See *Adverse Title*; *Insurance* 3; *Landlord and Tenant*.

ESTOPPEL IN PAIS. See *Tax Sales* 2.**EQUITY.**

1. When a sheriff commits a default, and the sureties on his bond after paying his liabilities proceed against him by indictment for embezzlement, and afterwards an agreement is entered into between the sureties who paid off said liability and the father of said sheriff, who was also one of his sureties, that, if he will pay them a certain sum of money, said criminal proceedings shall be strpped, and said father be released from further liability to his co-sureties,—if such agreement is so far executed that the money

EQUITY—*Continued.*

- is paid, and the *pro rata* share of said father on the liability of said surety is paid, and accepted by said co-sureties, in a chancery suit brought by said co-sureties against said father to make him contribute further, under the circumstances of the case, equity will leave the parties where it finds them, and the plaintiff's bill will be dismissed. *George v. Curtis*, 1.
2. By a decree confirming a sale of land, two commissioners are appointed to collect and disburse the purchase money on the claims thereto, fixed and determined by a former decree. One of the commissioners permits the other, who is the attorney for the claimants, to collect and disburse the purchase money, while he remains passive. Ten years after the death of the active commissioner, twenty-seven years after the date of their appointment, and thirty-one years after the decree fixing the claims and liabilities, the inactive commissioner files a bill to ascertain whether any of the purchase money remains unpaid, and, if so, to resell the land, but fails to allege or show that any of the purchase money remains unpaid, or that any of the claims against the same remain unsatisfied. Such bill is demurrable for want of equity. *Woods v. Campbell*, 203.
 3. The direction of an issue out of chancery is a matter of sound discretion. The mere omission to do so would not reverse a decree unless it was asked for. *West Va. Building Co v. Saucer*, 483.
 4. The evidence of parties who attempt to impose on a court of equity by false statements, manufactured accounts, or like deceptive practices, should be rejected on the hearing of the cause. *Atkinson v. Plumb*, 626.
 5. If a court of equity takes charge of a large fund brought into a chancery cause, and enters a general decree providing for the proportionate distribution of such fund among the distributees entitled thereto, and in subsequent and intermediate decrees relating to portions of such fund it apparently departs from such apportionment, in its final distribution of the residue of such fund it should so equalize the same as to make such final decree, including all intermediate decrees, conform to the general decree. *Kearfott v. Dandridge*, 673.
 6. If one of a number of distributees purchase a portion of the property subject to such fund in such suit, she is entitled to have her distributive share applied as a credit on her purchase money notes in the final distribution of the fund, and the court may make such application without her consent. *Id.*
 7. Chancery will not enjoin a judgment at law and grant a new trial merely for error in the law court, but only because of fraud, accident, surprise, or some adventitious circumstance unknown to the party before judgment, and beyond his control. *Graham v. Citizen's Nat. Bank*, 701.
 8. If a party know, or by ordinary diligence could have known, before a final judgment in a law court, a fact, he must make it the

EQUITY—*Continued.*

- ground of a motion for a new trial, and, if refused¹, go to an appellate court, as equity will not grant him a new trial for it. *Id.*
9. Equity will not grant a new trial because of prejudice in the community. That must be made available by application for a change of venue and writ of error. *Id.*
 10. A new trial in equity can not be had on merely asking. Particular grounds pointed out by equity law must exist, and they must be clearly proven. *Id.*
 11. Chancery can not reverse or set aside a judgment of a law court for error or other cause, and order the law court to grant a new trial, but it can act on the person of the owner of the judgment by injunction against the enforcement of the judgment, and direct a trial by jury, and, upon verdict, either perpetuate or dissolve, in whole or in part, the injunction. *Id.* 702.
 12. To entitle a plaintiff to relief in equity on the ground of mistake or fraud, the mistake or fraud must be clearly established. *Board of Trustees v. Blair*, 813.
See *Discovery*; *Implied Trust* 1; *Pendente Lite Purchaser*; *Rescuing Trust* 1; *Suretyship* 1; *Wills* 1.

EQUITY JURISDICTION.

When a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved to avoid a multiplicity of suits. *Watson v. Watson*, 290.

EQUITY PLEADING.

If an answer presents no bar to the bill, or contains some matter not material, exception should be made to it, pointing out defects, and not a mere general objection should be made, *Bennett v. Pierce*, 634.
See *Judgment Lien*; *Mortgage* 1; *Tender* 3.

EQUITY PRACTICE. See *New Trial* 1.

EQUITABLE ASSIGNMENT. See *Assignment*.

EQUITABLE RELIEF. See *Discovery*; *Vendor and Vendee*.

EVIDENCE.

- 1 In the trial of an action against a corporation so furnishing natural gas to a dwelling house, for damages for causing the destruction of such house by fire by negligently permitting too great a pressure of gas, it is not competent to prove by a witness the bare fact of what pressure the gauge of another gas company usually indicated. *Barrickman v. Marion Oil Co*, 635.
2. Where illegal evidence is admitted against the objection of a party, it will be presumed that it prejudices such party; and if it may have prejudiced him, though it be doubtful whether it did or not, it will be cause for the reversal of the judgment; but, if it

EVIDENCE—*Continued.*

clearly appear that it could not have changed the result if it had been excluded, it will not be cause for reversing the judgment. *State v. Hull*, 767.

3. A medical witness who is examined as an expert in the trial of an indictment for rape, after stating that he had been called upon to examine the prosecutrix, and the result of his examination, will not be allowed to express the opinion to the jury that no girl would have voluntarily submitted to the suffering necessary to have brought about this result. *Id.*
4. Where an injury relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible. *Id.*
5. While the admission in evidence of the opinions of experts necessarily give rise to very nice distinctions between facts and findings, it nevertheless does not annul the rule of law, axiomatic with reference to them, as well as to all witnesses, that they must not be so examined as to substitute their opinions for the verdict, and thus usurp the peculiar province of the jury. *Id.*
6. Point 5, Syl., in *State v. Zeigler*, 40 W. Va. 594, disapproved and overruled. *State v. Staley*, 793,
7. The credibility of a witness who has been impeached by proof of a former declaration at variance with his testimony may be supported by evidence of his good character for truth and veracity. *Id.*
8. Where a witness is introduced by plaintiff for the first time in rebuttal, the defendant should be permitted to introduce evidence to impeach him. *Id.*

See *Elections* by the People 4, 5; *Equity* 4; *Fraudulent Conveyance* 5, 7; *Instructions* 2; *Justice's Docket*; *New Trial* 2, 3, 4; *Province of Court*; *Record* 1; *Specific Performance*; *Verdict* 2.

EVIDENCE OF PAYMENT. See *Receipt*.

EXECUTORS.

1. Neither an administrator nor a debtor of the estate can be garnisheed, because it disturbs the proper administration of the estate, *Brewer v. Hutton*, 106.
2. Money, credits, and property are in the custody of the law when held by executors, administrators, guardians and like *quasi* officers in their representative and administrative capacity. *Id.* 107.
3. When the administration of an estate has been legally cast upon a sheriff, "he is thence forward entitled to all the rights, and bound to perform all the duties of such administration," which include as well all legal and equitable defenses to all actions and suits brought against the estate as to prosecute all proper actions and suits for the collection of claims and demands due the estate. *Id.* 107.

EXECUTORS—Continued.

4. Whenever an executor or administrator violates his trust, and another person takes advantage of the *devastavit*, knowing that the personal representative is not proceeding according to the requirements of the law or the terms of the will under which he was appointed, such complicity will authorize those interested in the estate to hold such third party liable. *Id.* 107.

EXCLUDING EVIDENCE. See *Verdict* 2.

EXPERT TESTIMONY, See *Evidence* 3, 4, 5.

FALSE EVIDENCE. See *Equity* 4.

FALSE PRETENSE. See *Fraudulent Conveyance* 2.

FAMILY RELATIONS. See *Fraudulent Conveyance* 9.

FELONY. See *Criminal Law* 3.

FENCES. See *Railroads* 1.

FIERI FACIAS. See *Judgment Lien*.

FINALITY OF DECREE. See *Decree* 2.

FIRE. See *Natural Gas*.

FIREWORKS. See *Municipal Corporations* 7.

FIXTURES. See *Taxation* 6.

FOREIGN ATTACHMENT. See *Foreign Contracts* 2.

FOREIGN BUILDING AND LOAN ASSOCIATION. See *Building and Loan Association* 1, 4.

FOREIGN CONTRACTS.

1. While the judgment of a competent court of any state that has jurisdiction over the person or subject matter is conclusive upon the merits of the controversy in every state, a court of another state has not the power, without service of process or voluntary appearance, to render a judgment on a contract that is absolutely void, under the statutes of the state where it is made. *Stewart v. Northern Assurance Co.*, 734.
2. If such a void contract is sued on by a foreign attachment in a foreign jurisdiction, the garnishee must make defense to the action, or notify, if practicable, his absent creditor of the pendency of the attachment proceedings, that such creditor may make such defense; otherwise, a judgment rendered by default will not protect the garnishee when sued by his creditor *Id.* 735.

FOREIGN CORPORATIONS.

A return of service of a summons in an action against a foreign insurance or other corporation upon an attorney appointed by it to accept service of process must show that he is the attorney so appointed to accept service of process. A return showing a delivery of a summons to "Alf. Paul, attorney in fact and of record for said Globe Fire Insurance Company," is bad, in not designating for what purpose he is attorney. Judgment on it is void. The return may be amended. *Adkins v. Globe Fire Ins. Co.*, 384. See *Corporations* 4, 6, 7, 8.

FOREIGN JUDGMENTS. See *Foreign Contracts* 1.

FORFEITURE See *Constitutional Law* 3; *Oil Lease* 4; *Taxation* 2, 3, 4; *Tax Sales* 3.

FORM OF VERDICT. See *Verdict* 4.

FORTHCOMING BOND.

No set-off of the sheriff's individual indebtedness can be allowed against a forthcoming bond given on the levy of taxes, under Acts 1893, c. 23. *Miller v. Wisener*, 59.

FRAUD.

1. To set aside a sale for fraud and conspiracy, suit must be brought within a reasonable time after the discovery of such fraud. *Williams v. Maxwell*, 297.
2. The *onus probandi* is on him that alleges fraud, and, if the fraud is not strictly and clearly proved as it is alleged, relief can not be granted. *Board of Trustees v. Blair*, 812.
3. The general principles applicable to fraudulent representations are well settled. Fraud is never presumed, and, where it is alleged, the facts sustaining it must be clearly made out. *Id.* 813. See *Contracts* 5; *Equity* 12; *Fraudulent Conveyance* 2; *Vendor and Vendee* 2.

FRAUDULENT CONVEYANCE.

1. On January 31, 1889, H. conveyed all his property, real and personal, to P., trustee, to secure his creditors named therein, in the order of priority named, including a debt of eight thousand one hundred dollars to C., to be the first paid after taxes, etc., which eight thousand one hundred dollars included an item of six thousand five hundred dollars in cash sent to wife of H. by C. at the time of the execution of the trust. On February 2, 1889, Z. G. Company instituted suit to set aside the trust as fraudulent and void as to the eight thousand one hundred dollars secured to C., in which suit the plaintiff was successful, H. and C. were adjudged to pay the costs of the suit, and all the property conveyed in the trust was sold, and proceeds paid to the creditors entitled to it, to the exclusion of C.'s claim, which was remitted to the

FRAUDULENT CONVEYANCE—*Continued.*

foot of the list of creditors to be last paid. On the 8th of January, 1891, and before final decree in the cause, H.'s wife returned to C. six thousand and twenty-five dollars of the identical money, in the same papers in which she had received it two years before from C., having kept it intact. In January, 1897, Z. G. Co. and others, creditors of H., filed their amended bill, alleging that the six thousand and twenty-five dollars so returned to C. was the property of H., and as such liable to their debts, and praying that C. be required to pay it into court, and that it be applied to their debts against H. *Held*, that the circuit court did not err in dismissing said amended bill. *Zell Guano Co. v. Heatherley*, 311.

2. P. executed an absolute deed for his land to J. P., in consideration of one thousand nine hundred dollars cash, dated June 1, 1893; and J. P., not being ready at the time said deed was executed to pay the cash, obtained possession of the deed on pretense that he wished to take it to a neighboring town to show it to a man, and at the same time executed a writing, and delivered it to P., reciting the purchase of the land for one thousand nine hundred dollars, and the execution of the deed, and agreeing that, if the sum of one thousand nine hundred dollars was not paid to P. in three days, then the deed should be null and void, but, if the said money was paid as aforesaid, the deed was to be of full effect. J. P. obtained possession of said writing, and, without authority of P., changed it so to read "June 15th," instead of "June 3d," and, on the same day on which said deed was executed, conveyed said land to O. C. W., both of which deeds were placed on record, but no part of the purchase money was ever paid: Said deed was fraudulent and void as to P. *O'Connor v. O'Connor*, 354.
3. The syllabus in the case of *Grocer Co. v. Williams*, 43 W. Va., 323, and in *Casto v. Greer*, 44 W. Va., 332, are affirmed. *Lawyer v. Barker*, 468.
4. Where an insolvent debtor conveys all the property owned by him, being the equity of redemption in a certain tract of land in trust to secure future repairs to be made thereon, and it does not appear that such repairs added to or enhanced the value thereof, such conveyance will be held void, under section 2, chapter 74, of the Code, as to the preference thereby secured. *Id.*
5. Where a suit is brought by a creditor assailing a transfer of property by his debtor as fraudulent and made with intent to hinder, delay, and defraud him in the collection of his debt, the proof of fraud rests on the party who alleges it, but circumstances may exist which will shift the burden of proof from the party impeaching the transaction on to the party upholding it. *Buller v. Thompson*, 660.
6. A conveyance made by a party of his entire property during the

FRAUDULENT CONVEYANCE—*Continued.*

pendency of a suit brought to recover judgment against him on a debt is a badge of fraud *Id.*

7. Where the creditor of a grantor assails in a chancery suit a deed made by a grantor as voluntary and fraudulent, the recitals of the deed that a grantee has paid the grantor a valuable consideration are not evidence against the creditor of such payment, and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor. *Id.*
8. Where a creditor files a bill to set aside as fraudulent a deed executed by his debtor which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money, or, if the deed was executed for the payment of existing debts, to prove the validity of such debts. *Id.*
9. Where a conveyance of property by an uncle to his nephew is assailed as fraudulent as to creditors, the parties are held to a fuller and stricter proof of the consideration and of the fairness of the transaction than if the conveyance was between strangers. *Id.* 661.

See *Administrators* 1; *Injunction Bond*; *Pendente Lite Purchaser*.

FRAUDULENT PURCHASER. See *Suit to Charge Land*.**GARNISHMENT.**

Voluntary payment to the attaching creditor will not screen the garnishee from his debt to his own creditor. *Brewer v. Hutton*, 107.
See *Executors* 1; *Foreign Contracts* 2.

GRANTOR. See *Co-Tenancy* 3.

GUARANTOR'S LIABILITY. See *Guaranty*.

GUARANTY.

The contract of a guarantor is collateral and secondary, and when he guarantees the payment of a bond secured by collateral mortgage referred to in the bond he is not liable upon his guaranty until resort has been had to the mortgage, also to the bond, for the collection of the moneys secured, unless the principal be insolvent, rendering further pursuit fruitless. *Middle States L. B. & C. Co. v. Engle*, 588.
See *Assumpsit*.

HARMLESS ERROR.

Where there is no other error, this Court will not reverse for error as to costs. *Graham v. Citizens Nat. Bank*, 702.

HOMICIDE. See *Verdict* 4.

HOUSEBREAKING. See *Burglary* 2.

HUSBAND AND WIFE. See *Implied Trust* 1, 2.

HUSBAND'S DEBT. See *Implied Trust* 2.

IDENTITY OF DOCUMENT.

A reference, by the certificate of acknowledgment or of recordation to the deed as "the foregoing writing," is sufficient to identify it as the deed which was acknowledged or recorded, as the case may be, without giving the date of the deed. *Fuse v. Gilfillan*, 214.

IMPEACHMENT. See *Evidence* 7, 8.

IMPLIED TRUST.

1. Where a tract of land is owned by a husband and wife, the same being part of a larger tract, she owning as her separate estate four-ninths and he two-ninths, and she joins with him in the execution of a deed of trust on the entire six-ninths to secure the payment of a debt owed by the husband, and dies before the debt falls due, leaving children, and when the trustee proceeds to sell the entire six-ninths, conveyed to him, if collusion is shown between him and the trustees, and it appears the sale is made only for the purpose of conferring title on him, equity will consider and treat him as a trustee for the children who inherited said four-ninths, subject to the trust as to said four-ninths. *Jones v. Thorn*, 186.
2. Where the debt secured by such trust was the debt of the husband, and the wife's property was only included in the trust deed as an additional security, equity would require that the husband's portion of the property should be exhausted before selling the wife's property. *Id.*

INCOMPETENT EVIDENCE. See *Evidence* 1.

INCORPORATION OF CHURCH. See *Corporations* 14.

INDICTMENT. See *Burglary* 1, 2.

INDIVIDUAL DEBTS. See *Forthcoming Bond; Taxation* 1.

INFORMALITIES IN ELECTION. See *Elections by the People* 1.

INJUNCTION.

A railroad company claiming adverse right and title to a right of way lawfully in possession of a rival company by virtue of condemnatory proceedings, cannot enjoin the latter company from proceeding to construct its road until just compensation is paid to the former company. But the disputed right and title must

INJUNCTION—*Continued.*

first be settled in law. *Kan., &c., R. Co. v. Glen J., &c., R. Co.* 119.

See *Equity* 7, 11; *Judgment* 2, 5, 6; *New Trial* 1.

INJUNCTION BOND.

An injunction bond payable upon the contingency specified in its condition, given before a deed of land which is a preference of one creditor over others, and which stands for the benefit of all creditors, on which bond judgment is recovered after the date of such deed, is entitled, under s. 2, c. 74, Code 1891, to share in said land, the owner of such judgment being a creditor. The contingent character of the bond makes no difference. *First National Bank v. Parsons*, 689.

See *Judgment* 6.

INJURY. See *Negligence* 2.

INJURY TO TRESPASSER. See *Negligence* 1.

IN LOCO PARENTIS. See *Resulting Trust* 2.

INNKEEPER. See *Agister's Lien* 2.

INSOLVENCY. See *Guaranty*; *Partnership* 2; *Vendor and Vendee* 4.

INSTRUCTIONS.

1. When an instruction of the court assumes certain things as facts, and is in such shape as to intimate to the jury what the judge believes the evidence to be touching such facts, it is error to give such instruction, although it may propound the law correctly. *State v. Allen*, 66.
2. A person may admit moral guilt of a wrong in cases where he is not legally liable; hence an instruction to the effect that, although the defendant admitted his negligence caused the injury, the plaintiff is not entitled to recover, unless the evidence including such admission shows that the defendant was negligent, and that such negligence was the proximate cause of the injury, is not improper, and, when asked, should be given. *Schwartz v. Shull*, 405.
3. An instruction to the effect that if the jury believes that the defendant was negligent, and that such negligence was the proximate cause of the injury complained of, they must find for the plaintiff, although they believe another person's negligence intervened between the negligence of the defendant and the injury, is erroneous. *Id.*
4. Point 4, Syl., in *State v. Bingham*, 42 W. Va. 234, approved; *State v. Staley*, 793,
See *Verdict* 1.

INSURANCE.

1. Where application is sent by an applicant or his agent from one state to an insurance company of another, and there accepted, and a policy of insurance is there issued, it is a contract of the state where issued. *Galloway v. Standard Fire Ins. Co.*, 237.
2. If a policy of insurance provides that it shall not be valid until countersigned by its agent at a certain place, it is a contract of the state where so countersigned. *Id.*
3. Where a policy of insurance provides that suit must be brought upon it within six months after loss by fire, and there is a promise by the company, within the six months, to pay the policy, and the whole period runs out before the company refuses to pay, such promise is a waiver of the limitation, and estops the company from pleading it, and is not a mere suspension of time from the promise until the refusal to pay. *Id.*
4. A policy of insurance provides that proof of loss shall be furnished in sixty days after loss, and the loss payable in sixty days after such proof furnished. The furnishing such proof is a precedent condition to action or recovery, if not waived, and the plaintiff carries the burden of showing that such proof was furnished; but he need not show it unless the defense has pleaded the failure to furnish such proof. *Adkin's v. Globe Fire Ins. Co.*, 384.

INSURANCE PREMIUMS. See *Corporations* 8.

INTENT OF PARTIES. See *Deed* 5, 6, 7.

INTENTION OF MAKER. See *Deed* 3.

INTEREST. See *Tender* 2, 3.

INTERLOCK. See *Adverse Possession* 1, 2.

ISSUE OUT OF CHANCERY. See *Equity* 3: *New Trial* 1.

ISSUANCE OF PROCESS. See *Process* 3.

JUDGE. See *Judgment* 5.

JUDGMENT.

1. Where a case is tried before a justice, and a bill of exceptions essential to enable a party to obtain a writ of *certiorari* is lost, if signed, or if not signed, the justice sickened and died without signing it, and there appears probable ground for a writ of *certiorari*, it is a proper case for equity relief against the judgment, and for retrial. *Grafton & G. R. Co. v. Davisson*, 12.
2. Where an injunction to a judgment is only perpetuated as to part of it, or a reversal is only as to part of a judgment, the lien of the part not affected continues from the date of the judgment. *Id.*

JUDGMENT—*Continued.*

3. A judgment rendered by two justices sitting together is not void for that reason. *Griffin v. Haught*, 460.
4. When two justices sit together at the trial of a case, and no objection is made thereto at the time, the validity of the judgment cannot afterwards be questioned on that account. *Id.*
5. In case the judge of a circuit is interested, a circuit court of a county of an adjoining circuit has jurisdiction to enjoin a judgment rendered in a court of his circuit. *Graham v. Citizen's Nat. Bank*, 701.
6. Where there is an injunction to a judgment against two or more persons, and only one signs the injunction bond or applies for the injunction, upon dissolution there should not be award of execution for damages at ten per cent. on principal, interest, and costs from the date till dissolution of the injunction against all the judgment debtors, but only against those signing the bond or asking the injunction; nor should costs in the injunction case be given against those not going in bond or injunction. *Id.* 702.
See Chattel Mortgage 2; Equity 7, 8, 11; Injunction Bond; Justice of the Peace 1, 2; Sale of Realty 1.

JUDGMENT CREDITOR. *See Statute of Limitations 2.*

JUDGMENT LIEN.

A bill to enforce a judgment lien must state that a writ of *fiери facias* has been returned "No property found," or that no execution issued within two years from the date of the judgment. This is not required as to judgments of date before the act of 13th March, 1891. *Dunfee v. Childs*, 155.

JUDICIAL SALES. *See Attorney and Client; Fraud 1; Laches 1; Mortgage 3.*

JURY. *See Depositions; Evidence 6; Verdict 1, 3.*

JURISDICTION.

An unconstitutional act forming a delegate district or apportioning delegates for the House of Delegates may be declared void by the courts, although the act is the exercise of political power, since in such case the question is judicial. *Harmison v. Ballot Commissioners*, 179.

See Judgment 5; Right of Action; Res Adjudicata 3; Supreme Court of Appeals 1, 2.

JUSTICE OF THE PEACE.

1. If a justice fail to attend to try a case pending before him at the hour set, and no other justice appears to try the case at that time, when the hour has elapsed the case stands continued, by operation of law, for one week. After such continuance has been con-

JUSTICE OF THE PEACE—*Continued.*

summed by the necessary lapse of time, one of the parties to the suit, in the absence of and without the consent of the other, cannot call in another justice to proceed with the trial of the case. If he does so, his judgment is without jurisdiction, and void, and may be set aside by the original justice, in custody of the docket and papers, on motion, after notice to the opposing party. *Parsons v. Aultman, Miller & Co.*, 473.

2. If such justice refuse to set aside such judgment and rehear such case, an appeal will lie from his judgment to the circuit court, as in other cases; and if he refuse to grant the same within ten days, the circuit court of the county, or judge thereof in vacation, may grant the same on application. *Id.*
See *Judgment* 1, 3, 4; *Record* 2; *Unlawful Entry and Detainer* 1, 2.

JUSTICE'S DOCKET.

Where a justice's docket omits to enter a proceeding which should be entered other proper evidence may be admitted to prove the proceeding. *Anderson v. Henry*, 319.

LACHES.

1. One who delays three years after knowledge of all the facts attending a sale before bringing such suit is guilty of such laches as will debar him from relief. *Williams v. Maxwell*, 297.
2. Laches will not bar a landowner from assailing a tax sale of his land, when there is no actual possession under the tax title. *State v. Sponaugle*, 415.
3. Laches is not imputable to the State. Statutes of limitations now run against the State. *Id.* 416.
4. If a party allege the finding of a document since the decree which would have been relevant evidence for him on the hearing, and knew of its existence and contents, though he made diligent search for it before the decree without finding it, yet, if he could have proven its existence and contents by the evidence of witnesses, he should have done so, and cannot on that ground sustain a bill of review. *Wethered v. Elliott*, 436.
See *Co-Tenancy* 4, *Estoppel*; *Equity* 2.

LAND.

The word "land" in section 2, chapter 94, Code, is used in a restricted sense to denote agricultural or farming land, and not town lots used for building purposes alone. *Shufflin v. House*, 731.

LANDLORD AND TENANT.

1. Where a person claiming title takes a lease of the same land under a different title, in the absence of fraud or mistake, he is es

LANDLORD AND TENANT—*Continued.*

topped to deny his landlord's title or possession. *Bodkin v. Arnold*, 91.

2. Section 12, chapter 93, Code 1891, gives a lien for one year's stipulated rent, whether accrued or not, upon the tenant's goods carried on the premises over liens created after the commencement of the tenant's term by deed of trust, mortgage, or otherwise, though no distress warrant has been issued for such rent. *Anderson v. Henry*, 319.

LANDLORD'S LIEN. See *Landlord and Tenant* 2.

LAPSE OF TIME. See *Co-Tenancy* 4; *Presumption of Payment*.

LEASE.

1. If a lessee for life or years take a new lease of the reversioner for a longer or shorter term than before, it is a surrender of the first lease. *Wade v. South Penn Oil Co.*, 380.
2. A lease yielding rent and an option to purchase the fee outright are not inconsistent, and the taking such lease during the term of the option will not abrogate or surrender it. *Id.*
3. Where there is a lease for years with rent, and an option to purchase the fee, an election to purchase under the option, and tender of the purchase price under it, ends the lease and its rent. *Id.* See *Landlord and Tenant* 1; *Tenancy for Life* 2.

LEAVE OF COURT. See *Bill of Review* 1; *Depositions*.

LIABILITY. See *Municipal Corporations* 7,

LIABILITY OF PARTICIPANTS. See *Executors* 4.

LIENS. See *New Parties*; *Partnership* 2; *Resulting Trust* 3; *Re-Adjudicata* 1; *Riparian Lands*.

LIMITATION. See *Bill of Review* 2.

LIMITATION OF ACTION. See *Insurance* 3.

LIST OF SALES. See *Tax Sales* 4.

LIVE STOCK. See *Agister's Lien* 1.

LIVERY OF SEISIN.

Section 1, chapter 116, Code Virginia, 1849, taking effect 1st of July, 1850, abolished livery of seisin. *Lauck v. Logan*, 252.

LOAN. See *Assumpsit*; *Resulting Trust* 2.

LOCUS CONTRACTUS. See *Contracts* 3; *Insurance* 1 2,

MACHINERY. See *Mortgage* 2, 3.

MANDAMUS.

1. *Mandamus* lies to compel a board of canvassers canvassing returns of an election to recount the ballots between competing candidates for office on the demand of either, when they refuse such recount. *Hebb v. Cayton*, 578.
2. Where upon a petition for a *mandamus* a rule to show cause why the writ should not issue is awarded, instead of a *mandamus nisi*, and there is no answer to the rule raising an issue of fact, there need be no writ of *mandamus nisi*, and a peremptory writ issues; but where there is an answer raising an issue of fact, a *mandamus nisi*, embodying the facts justifying the *mandamus*, must be awarded, and it is treated as the declaration. *Id.*
3. A *mandamus* will not issue to compel an election canvasser to assent to and certify the result of a recount of ballots as found by another canvasser, though both were present at it, if they disagree as to such result, and the unwilling one says it is not an adequate, correct, true recount. *Dent v. Board of Commissioners*, 750.
4. A *mandamus* cannot be brought against an officer in his official capacity after his term of office has ended. *Id.* 751.
See *Corporations* 13

MARRIED WOMEN

1. G., a married woman, together with her husband, enter into a written contract, under seal, dated June 25, 1892, with F., to erect a three-story double brick building on her lot, in the city of Parkersburg, according to specifications, for which she is to pay to F., in payments as in said contract set forth, six thousand five hundred dollars, (three thousand two hundred and fifty dollars is to be paid as the work progresses, and the balance, one thousand six hundred and twenty-five dollars in one year from the date of the completion of the work, and one thousand six hundred and twenty-five dollars in two years from the completion of the work, to be evidenced by negotiable notes, with the bank discount added), and to execute a deed of trust upon said property to secure the balance unpaid, when building is completed. This contract is signed and sealed by all the parties, but not acknowledged. On the 26th day of September, 1892, another agreement or addendum is made to said agreement, designated as: "Modification of an agreement Made and entered into on the 25th Day of June, 1892. This agreement, made and entered into this 26th day of September, 1892, by and between Mrs. E. M. Gilfillan and Edward Gilfillan, parties of the second part,"—which agreement provides that F., shall provide and additional story, the fourth story to be finished for a hall, and the price therefor to be agreed upon, as well as any changes in the plans that might be made, and, if the parties could not agree upon the price, their differences were to be submitted to a third party, and specifically

MARRIED WOMEN—*Continued*

refers to the original agreement of June 25th, and in terms makes it part of this. The addendum also set forth that the contract was made, and the price to be paid, for the improvement of G.'s separate real estate, and declared that the debt thereby contracted was created and incurred for that purpose, and expressly charged her (lot) separate real estate, and all the improvements thereon, with the payment of said debt mentioned in the original agreement, and with the amount of any and all sums necessary to put on the fourth story, and any other modifications that might be agreed upon, which addendum and modification was also signed and sealed by the said G. and husband; and the paper, thus completed, was by them duly acknowledged on the 7th day of October, 1892, and duly recorded on the 1st day of November, 1892. *Held* to be a valid contract, under section 12, chapter 66, of the Code, as amended by chapter 109, Acts 1891, and to create a charge and liability upon said property for the price of such improvements. *Fouse v. Gilfillan*, 213.

2. A purchaser of such property takes it with notice of such charge and liability. *Id* 214.
See *Deeds* 8, 9.

MASTER AND SERVANT.

The measure of care imposed upon the master for the safety of his servant in the use of dynamite is that ordinary care which reasonable and prudent men would and do exercise under like circumstances. *Schwartz v. Shull*, 405.

MECHANIC'S LIEN.

1. If a builder has completed his work according to contract in all material, substantial features, his mechanic's lien is not lost merely because there are minor, unsubstantial, unimportant omission or defects. *West Va. Building Co. v. Saucer*, 483.
2. Where a material man, workman, laborer, mechanic, or other person, performs any labor or furnishes any material or machinery for constructing any house, mill, manufactory, or other building or structure, by virtue of a contract with the owner or his authorized agent, he shall have a lien, to secure the payment of the same, upon such house or structure, and upon the interest of the owner of the lot of land on which the same may stand; and such lien will not be affected by the party claiming the same accepting negotiable notes for the amount of his account, which notes are not made payable after the time fixed for bringing a suit to enforce the mechanic's lien. *Cushwa v. Improvement L. & B. Association*, 490.
3. The acceptance of the note of a debtor, payable after the time granted by the statute for filing a mechanic's lien, and maturing before the expiration of the time limited for bringing suit, will

MECHANIC'S LIEN—*Continued.*

not bar a suit and recovery upon the lien, if the notes are produced to be surrendered at the trial. *Id.*

4. Where work has been commenced and material furnished under a contract, for constructing buildings, with the owner of the land on which buildings are to be erected, the mechanic's lien attaches from the time the performance of the work and furnishing materials begin, and such mechanic's lien is entitled to priority over a deed of trust subsequently executed on the same property. *Id.* 491.

MERGER.

Where a greater and less estate unite in the same person, without intermediate estate, the less at once merges into the greater. *Turk v. Skiles*, 82.

MORTGAGE.

1. A bill to redeem a mortgage must allege and rely upon a tender if one is claimed; and the money must be paid into court. *Shank v. Groff*, 543.
2. If machinery under mortgage is placed in a mill already mortgaged, it becomes subject to the realty mortgage, to the extent that is necessary to keep the security thereof unimpaired. So far as the personalty mortgage is concerned, if such machinery is mortgaged to its full value, and it will not damage the mill property by its removal, the mortgagee or purchaser may remove the same; otherwise, he must make good the damage caused by such removal. *Hurxthal's Ex. v. Hurxthal's Heirs*, 584.
3. When a mill and its machinery are subject to separate mortgages, and are sold under decree of court, they should be offered for sale both separately and together, and then sold in whichever way they will bring the larger sum. *Id.*

MOTION FOR REVERSAL. See *Bill of Review*, 2.

MUNICIPAL CORPORATIONS.

1. Violation of the public ordinances of cities, towns, and villages are strictly criminal in nature, being offenses against the public, and not merely private wrongs. *City of Charleston v. Beller* 44.
2. In prosecutions for such offenses, costs are not recoverable against such city, town, or village. *Id.*
3. A subsequent municipal ordinance, fully covering the subject-matter of a previous ordinance, being a substitute therefor, repeals the former by implication, without words to that effect. *Knight v. Town of West Union*, 194.
4. In a municipality having less than six hundred voters, an election confined solely to the question of the issue of municipal bonds is not invalid because conducted in the mode prescribed for the election of municipal officers in the absence of political or party nominations. *Id.*

MUNICIPAL CORPORATIONS—Continued.

5. In an ordinance the authorization of bonds not to exceed six thousand dollars is equivalent, in legal effect, to fixing the amount of such bonds at such sum. In either case, the authorities would only have the right to issue bonds sufficient to cover the purpose for which the ordinance is adopted. *Id.* 195.
6. Section 31, chapter 47, Code, authorizes towns and villages chartered under such chapter to levy taxes, not exceeding one dollar on every hundred dollars of property within such municipality. *Id.* 195.
7. An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets by a crowd of citizens, although such acts be done with the knowledge and consent of the mayor, council, police, and other officers of such corporation. *Bartlett v. Town of Clarksburg*, 393.
8. As to the powers and functions of an incorporated town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein. *Id.*

MUNICIPAL COUNCIL. See *Supreme Court of Appeals* 1.

MUNICIPAL OFFICERS.

The acts of *de facto* municipal officers, within the scope of their authority and under color of law, are valid and binding, in the absence of clear proof that they are not the *de jure* officers of such municipality. *Knight v. Town of West Union*, 195.
See *Municipal Corporations* 7.

MUNICIPAL OFFICE, See *Contested Election*.

MISTAKE, See *Equity* 12.

NATURAL GAS.

The mere fact that a building so furnished with gas was set on fire from the gas is not sufficient to justify the inference that an increased pressure of gas caused the fire. *Barrickman v. Marion Oil Co.*, 635.
See *Evidence* 1; *Negligence* 3, 4, 5, 6.

NEGLIGENCE.

1. A landowner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is a child does not raise a duty where none otherwise exists. Such a trespasser, injured on such premises, cannot recover of the landowner by reason of the unsafe condition of the premises, unless this negligence be so gross as to amount to a wanton injury. *Ritz v. City of Wheeling*, 262.

NEGLIGENCE— *Continued*

2. The proximate cause of an injury is the last negligent act contributing thereto, and without which such injury would not have resulted. *Schwartz v. Shull*, 405.
3. A person or corporation engaged in furnishing natural gas to stoves, heaters, pipes, etc., for purposes of domestic light, heat, and fuel in a dwelling house, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of the business, that injury to others may not be caused thereby; that is to say, if the delicacy, difficulty and danger are extraordinarily great, extraordinary skill and diligence is required. *Brraickman v. Marion Oil Co.*, 634.
4. If the defendant, so furnishing such gas, negligently and carelessly suffer and permit a greater amount of pressure of said gas to be furnished than is reasonably proper for said purpose, by reason whereof the house or building being so furnished is consumed or injured by fire, resulting from such negligence, the defendant is liable in damages for such loss. *Id.*
5. If such defendant suffer and permit its regulators or other appliances to be and remain for an unreasonable time in such condition that they do not control the amount and pressure of gas so furnished, so that more than a safe and proper amount of gas is so furnished, the defendant is guilty of negligence, and liable in damages for injuries proximately caused by such negligence. *Id.*
6. If such injury is the natural consequence of such negligence, and such as might have been foreseen and reasonably anticipated as the result of such negligence, then such negligence must be regarded as the proximate or direct cause of the injury, in the absence of intervening negligence. *Id.*
See *Instructions* 2, 3.

NEGLIGENCE OF OFFICERS. See *Municipal Corporations* 8

NEGOTIABLE NOTES. See *Mechanic's Lien* 2.

NEW PARTIES.

Petitions for relief in a cause filed by new parties must have process against parties to be affected thereby; but, if they seek to enforce liens, and an order to convene liens is made, the liens stated in the petition may be presented to a commissioner without such process on such petition. *Dunfee v. Childs*, 155.

NEW TRIAL.

1. Upon a bill in chancery to enjoin a judgment at law, and for a retrial, there must not be a decree before such retrial annulling the judgment and granting a new trial in the law court; but the judgment is allowed to stand as security for what may be found to be justly due, and the injunction allowed to stand until after

NEW TRIAL—*Continued.*

- the retrial, and the decree should direct an issue or issues to be tried in the circuit court to find what the nature of the case requires, and upon the verdict the court should perpetuate or dissolve, wholly or partially, the judgment. *Grafton & G. R. Co. v. Davisson*, 12.
2. If the evidence presents mixed questions of law and fact, material to the issue involved, about which two reasonable men, learned in the law, might differ as to the proper determination thereof, the circuit court commits no appealable error in awarding a new trial. *Michaelson v. Cautley*, 533.
 3. If improper testimony in favor of the prevailing party is admitted by the justice, and it be doubtful whether the same was prejudicial to the opposite party or not, the action of the circuit court in awarding a new trial will not be reviewed by this Court. *Id.*
 4. Where the verdict of a jury is wholly without evidence on a point essential to a finding, or the evidence is plainly insufficient to warrant such finding by the jury, the same should be set aside and a new trial awarded. *Vintroux v. Simms*, 548.
See *Equity* 7, 8, 9, 10, 11.

NEWLY DISCOVERED EVIDENCE. See *Bill of Review* 1, 3, 4; *Laches* 4.

NONENTRY. See *Taxation* 2, 3, 4.

NONPRODUCTIVE WELL. See *Oil Lease* 3.

NOTARY PUBLIC.

The certificate of a notary public to said paper, that "E. M. G. and E. G., whose names are signed to the foregoing writing, have this day acknowledged the same before me, in my county aforesaid," is sufficient to show the acknowledgment of the whole paper dated June 25 and September 26, 1892. *Fouse v. Gilfillan*, 214.

NOTES.

A note will not be regarded as an absolute extinguishment or payment of a precedent note or pre-existing debt, unless it be so expressly agreed, whether the note received was that of one bound or a stranger. *Cushwa v. Improvement L. & B. Association* 490.
See *Mechanic's Lien* 3.

NOTICE. See *Co-Tenancy* 2; *Contested Election*; *Justice of the Peace* 1; *Unrecorded Deed*.

OFFER TO PAY. See *Tender* 1.

OFFICERS. See *Elections by the People* 1.

OFFICERS *DE FACTO*. See *Municipal Officers*.

OFFICERS *DE JURE*. See *Municipal Officers*.

OIL AND GAS. See *Oil Lease* 6; *Taxation* 5.

OIL LEASE.

1. A lease for the purpose of operating for oil and gas for the period of five years, and so much longer as oil or gas is found in paying quantities, on no other consideration than prospective oil royalty and gas rental, vests no present title in the lessee except the mere right of exploration; but the title thereto, both as to the period of five years and the time thereafter, remains inchoate and contingent on the finding, under the explorations provided for in such lease, oil and gas in paying quantities. *Steelsmith v. Garland*, 27.
2. Such lease must be construed as a whole, and if there is no provision therein contained requiring the boring of another well after the first unsuccessful attempt is completed and abandoned, the lease becomes invalid, and of no binding force as to any of its provisions. *Id.*
3. The completion of a nonproductive well, though at great expense, vests no title in the lessee. *Id.* 28
4. A lease for oil and gas contemplates that the lessee have two years in which to bore a well, and provides "that the party of the second part shall pay to the party of the first part \$5.00 per month in advance, until a well is completed, from the date of this lease, and a failure to complete such well, or to pay said rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall, after such failure, accrue to either party on account of the breach of any covenant herein contained. * * * It is further agreed that the second party shall have the right at any time to surrender this lease to the party of the first part, and thereafter be fully discharged." The lessee bores no well, but holds the lease a number of months, and then surrenders it. *Held*, that the forfeiture provisions are for the lessor's benefit, and he can avail himself of them to declare a forfeiture for nonpayment of rental or not, as he chooses, and, if he does not, can recover rental until the surrender of the lease. The lessee's mere failure to pay does not release him from obligation to pay. There was tacit consent to renew. *Roberts v. Bettman*, 143
5. Where, under a lease, there may be recovery of monthly rental for a number of months, but not for all claimed by plaintiff, and he recovers a verdict for more than he is entitled to, he may release the amount beyond the proper number of months, and defendant cannot complain of it. *Id.* 144.
6. Where a party holds a lease upon land for oil and gas purposes, upon the usual terms and conditions, paying one-eighth of the oil

OIL LEASE—*Continued.*

produced as royalty, the oil while it remains *in situ* must be regarded as realty, and as remaining the property of the lessor until brought to the surface. *Carter v. Tyler County Court*, 806. See *Taxation* 5.

ORAL CONTRACT. See *Specific Performance*.

ORAL EVIDENCE. See *Receipt*.

ORDER OF PUBLICATION.

An order of publication as follows: "West Virginia, to wit: At rules Held in the Clerk's Office of the Circuit Court of Wood County on the first Monday in January, 1897. Robert G. Styles, Administrator of the Estate of W. C. Styles, Jr., Deceased, Complainant vs. Laurel Fork Oil and Coal Company, a Corporation, and Others Defendants, In Chancery. The object of this suit is to recover from the defendant the Laurel Fork Oil & Coal Co., a corporation, \$26,646.10 interest and costs, to dissolve and wind up the affairs of said corporation, and distribute the proceeds of sale of property of said corporation, to attach and subject to sale the tract of ——— acres of land owned by said corporation, to have a receiver appointed for the assets of said corporation, and for general relief; and it appearing by affidavit filed that L. C. Gratz, H. S. Gratz, Ella Fell, Mrs. H. A. Styles, John Scott, and S. G. Rosengardner are not residents of this state, on motion of the complainant, by counsel, it is ordered that said absent defendants do appear within one month after the first publication of this order, and do what is necessary to protect their interests in this suit, and that a copy of this order be forthwith published and posted according to law. (A copy. Teste) O. M. Clemens, Clerk,"—is not an order of publication against the defendant corporation, under the statute. *Styles v. Laurel Fork O. & C. Co.*, 375. See *Process* 1. 2.

ORDER TO CONVENE LIENS. See *Creditor's Bill*; *New Parties*

ORDINANCE. See *Municipal Corporations* 3, 5.

ORDINARY CARE. See *Master and Servant*.

OMISSION. See *Justice's Docket*.

OPEN ACCOUNT. See *Assignment*.

OPINION EVIDENCE. See *Evidence* 4, 5.

OPTION. See *Lease* 2, 3; *Oil Lease* 4.

OUSTER. See *Co-Tenancy* 3, 4, 5.

PARTIES. See *Corporations* 10; *Creditor's Bill*.

PARTIES *IN PARI DELICTO*. See *Equity* 1.

PARTNERSHIP.

1. A partner has no individual assignable interest in the social assets until the social debts are satisfied. *Kenneweg v. Schilansky*, 521.
2. An assignee of a partner's individual interest in an insolvent firm cannot successfully attack an alleged partnership assignment, made to secure a just partnership debt, as the latter is a lien on the social assets superior to the claims of the individual partners or their creditors. *Id.*

PARTNER'S INTEREST. See *Partnership* 1.

PATENT. See *Taxation* 3.

PAYMENT.

A debtor must seek his creditor to pay him, unless the creditor be out of the State. *Galloway v. Standard Fire Ins. Co.* 237.
See *Resulting Trust* 1.

PAYMENT FOR STOCK. See *Corporations* 3.

PAYMENT BY GARNISHEE. See *Foreign Contracts* 2.

PAYMENT OF DEBT. See *Notes*.

PAYMENT UNDER CONTRACT. See *Error*.

PENDENTE LITE PURCHASER.

On the 15th day of August, 1893, a suit in equity was instituted to set aside said deed as fraudulent and void by P., making J. P., and O. C. W. parties defendant. After process in said suit had been served, but before the bill had been filed, O. C. W. executed a deed for said land to the R C. C. & C. Co. Said company thereby became a *pendente lite* purchaser, and took said land subject to the equities in litigation in said bill, and was bound to abide by its result. *O'Conner v. O'Conner*, 354.
See *Administrators* 1.

PERFORMANCE OF CONTRACT. See *Mechanic's Lien* 1.

PERSONAL PRIVILEGE. See *Statue of Limitations* 3, 4.

PERSONAL PROPERTY. See *Taxation* 6.

PETITION. See *Mandamus* 2.

PETITION FOR RELIEF. See *New Parties*.

PLACE OF HOLDING COURT. See *Court House* 1, 2.

PLEADING. See *Record* 2; *Statute of Limitations* 2, 3.

PLEADING IN PERSON. See *Criminal Law* 3, 4.

POLICY. See *Insurance* 1, 2, 3.

POSSESSION. See *Co-Tenancy* 4; *Laches* 2.

POSSESSION OF DEED. See *Fraudulent Conveyance* 2.

POSTOFFICE. See *Contracts* 4.

POWER OF ATTORNEY.

On the 23d day of June, 1893, P. entered into an executory contract with L. H. K., by which he agreed to sell him said tract of land upon the terms and for the consideration therein set forth, and on the same day executed to L. H. K. a power of attorney, wherein he recited the facts in regard to his sale to J. P., his fraudulent conduct and failure to pay the purchase money, and also as to the sale to L. H. K. and authorized L. H. K. to institute and prosecute to final hearing a proper suit in equity in his name, or in the name of L. H. K., as it might appear proper, for the purpose of setting aside and annulling said deed of conveyance to J. P., the deed to O. C. W., and any other contracts that might have been made in reference to said tract of land; authorizing said L. H. K., to settle any and all matters of difference between him (P.) and J. P. (it appearing that there were several matters of account existing between P. and J. P.) and to attend to all business affairs of his generally. Subsequently J. P. paid to L. H. K. one thousand dollars of the original purchase money for said land, which P. declined to receive, and shortly afterwards brought suit to set aside his deed to J. P. as fraudulent and void. *Held*, that in the circumstances of the case, and in view of the facts set forth on the face of said power of attorney, it was not the intention of P. to authorize L. H. K. to receive and collect said purchase money from J. P., and its reception by L. H. K. did not ratify and confirm the sale to J. P., or waive the effect of the fraud. *O'Connor v. O'Connor*, 355.

PRACTICE. See *Mandamus* 2.

PREFERRED CREDITORS. See *Fraudulent Conveyance* 4; *Injunction Bond*.

PREMIUMS ON LOANS. See *Building and Loan Associations*, 2.

PRESENCE OF PRISONER. See *Criminal Law* 5.

PRESSURE OF GAS. See *Evidence* 1; *Natural Gas*; *Negligence* 4.

PRESUMPTION OF DEATH. See *Death*.

PRESUMPTION OF PAYMENT.

Where the presumption of payment arises by reason of the lapse of twenty year's time, a bill seeking enforcement of such stale demand must set up facts and circumstances sufficient to rebut such presumption, or it will be demurrable. *Jarvis v. Martin's Adm'r.* 347.

PRIORITY OF LIENS. See *Landlord and Tenant* 2; *Mechanic's Lien* 4; *Riparian Lands*.

PRIORITY OF LOCATION. See *Railroads* 2

PRISONER IN MANACLES. See *Criminal Law* 1, 2.

PROCESS.

1. Where it does not appear from the record whether process was duly served, or order of publication duly published and posted, or not, except from the decree, which declares that "process was duly served" or "order of publication was duly executed as to the defendants," it will be presumed that it was so served or executed. *Styles v. Laurel Fork O. & C. Co.*, 374.
2. But when the record shows the process or order of publication, and shows clearly that process was not served or order of publication executed as to any particular defendant, such declaration in the decree will not raise such presumption as to such defendant. *Id.*
3. Process to commence a suit or action is issued by the clerk on the order of the plaintiff or his attorney or agent, and not by order of the court. *Abney v. Ohio L. & M. Co.*, 446.
See *Attachment* 2; *New Parties*.

PROHIBITION.

1. Prohibition is the proper remedy to prevent the enforcement by execution, of an unauthorized judgment for costs. *City of Charleston v. Beller*, 44.
2. When a board of election canvassers assume jurisdiction, which it has not, to canvass and declare the result of a vote upon the relocation of a county seat, prohibition will lie to restrain it, though, in its proper action, its functions are ministerial, and not subject to prohibition. *Brown v. Board of Canvassers*, 826.

PROMOTER'S RIGHTS. See *Corporations* 1, 3.

PROOF OF FRAUD. See *Fraud* 3.

PROOF OF LOSS. See *Insurance* 4.

PROVINCE OF COURT.

Where the evidence is not contradictory, proximate cause is a question of law to be determined by the court, and not a question of fact to be submitted to a jury. *Schwartz v. Shull*, 405.

PROXIMATE CAUSE. See *Instructions* 3; *Negligence* 2, 5, 6; *Province of Court*.

PUBLIC POLICY. See *Contracts* 1, 6.

PUBLIC SCHOOLS.

1. The law of this State does not authorize boards of education to discriminate between white and colored schools in the same district as to length of term to be taught. *Williams v. Board*, 199.
2. Where a teacher has been employed to teach a colored school by the trustees, under the supervision of the board of education, and she teaches the same the full term of the other primary schools in the same district, satisfactory to the patrons of such school, she is entitled to pay for her whole term of service; and the board of education cannot escape the payment thereof by interposing a plea that it had, by reason of the school being a colored school, limited the term thereof to a shorter period than the white schools in the same district. Such discrimination, being made merely on account of color, cannot be recognized or tolerated, as it is contrary to public policy and the law of the land. *Id.*

PUBLIC WRONG. See *Municipal Corporations* 1.

PURCHASE BY TRUSTEE. See *Trusts*.

PURCHASER FOR VALUE.

A purchaser for value without notice, having obtained a conveyance, will not be affected by a latent equity by lien, incumbrance, trust, fraud or other claim. *Turk v. Skiles*, 82.
See *Married Women* 2.

PURCHASE OF COMMON PROPERTY. See *Co-Tenancy* 2.

PURCHASE OF REVERSION. See *Tenancy*.

PURCHASER'S RIGHTS. See *Sale of Realty* 2.

QUANTITY OF ESTATE. See *Deed* 1.

QUANTUM MERUIT. See *Contracts* 2.

QUASI OFFICERS. See *Executors* 2.

RAILROADS

1. A railroad company is not bound to fence its line from adjoining improved land except where it has condemned land for its use. *Grafton & G. R. Co. v. Davisson*, 12. *Couch v. C. & O. R. Co.*, 51.
2. As between rival railroad companies, priority of location gives priority of title, which is perfected by after-condemnation. The title thus acquired is derived from the State by virtue of its right of eminent domain, and entirely supersedes and annuls the title of the landowner on payment of just compensation to him, and re-invests the same in the applicant therefor. *Kan. &c. R. Co. v. Glen J. &c. R. Co.*, 119.
See *Eminent Domain; Injunction*.

RAPE. See *Evidence* 3.

REAL ESTATE. See *Oil Lease* 6

REAL ESTATE AGENT. See *Agency* 2, 3.

RECEIPT.

A receipt, so far as it is a mere admission, is not conclusive evidence of the payment therein acknowledged, but the party signing it may invalidate it by oral evidence of fraud or mistake; for the document amounts only to *prima facie* proof, and is capable of being explained. *Cushwa v. Improvement L. & B. Ass'n.*, 490.

RECEIVERS. See *Corporations* 7.

RECOGNITION OF TRANSACTION. See *Estoppel*.

RECORD.

1. Evidence of witnesses heard by such inferior tribunal is not part of the record, unless made so by proper order or bill of exceptions showing such evidence duly certified and authenticated. Where such is not the case, the circuit court cannot review the action of the inferior tribunal on its merits. *Cushwa v. Lamar*, 327.
2. When there is no note in the record of the filing of complaint or answer in an action originating before a justice, but there is copied into the record both a complaint by the plaintiff and an answer by the defendant signed by them respectively, with which the evidence of the parties adduced on the trial is entirely consistent, and the record shows there was a full and fair trial, the court will presume that the pleadings were so made up. *Griffin v. Haught*, 460.
See *Argument of Counsel; Bill of Exceptions* 2; *Commissioners in Chancery* 2; *Criminal Law* 2, 3, 4, 5; *Process* 1, 2; *Res Adjudicata* 4.

RECORDATION.

The certificate of the clerk of the county court of the proper county to said paper, that the foregoing writing, bearing date on the 25th day of June, 1892, with the certificate of acknowledgment thereto annexed, was on the day mentioned duly admitted to record in his said office, is sufficient evidence of the recordation of the whole paper. *Fouse v. Gilfillan*, 214.

See *Corporations* 12

RECOUNT. See *Elections by the People* 2, 3; *Mandamus* 1, 3.

RECOVERY. See *Corporations* 8.

RECOVERY OF RENTAL. See *Oil Lease* 5.

REFERENCE. See *Identity of Document*.

RELEASE. See *Oil Lease* 5.

RELEASE OF SURETY. See *Suretyship* 1, 2, 3, 4.

REMAINDER MAN. See *Tenancy for Life* 1.

REMARKS OF JUDGE.

Remarks made by the trial judge in the presence of the jury (referring to a witness who had testified for the state), as follows: "Suppose Dr. Burgess, whose integrity is not to be questioned, when placed by a party upon the witness stand to testify as to matters coming within his professional conduct or employment, and having so testified, the opposite party was to bring in two or three witnesses from another county, say, from Huntington, who were entire strangers to the people of Wayne county, and who upon the witness stand, were to testify to their having heard Dr. Burgess, in Huntington, make statements directly contradicting those made by him on the witness stand; would it not be a reasonable and logical rule that would permit the party so calling him to introduce, upon rebuttal, witnesses acquainted with his general reputation, to testify as to his good character for truth?"—the "two or three witnesses" referred to being summoned as experts on behalf of the defendant, and so testified in the case, touching the matter of the evidence of said witness Burgess,—*held* to be error, which might prejudice the defendant. *State v. Staley*, 793.

REMOVAL OF BUILDINGS. See *Tenancy for Life* 1.

REMOVAL OF MACHINERY. See *Mortgage* 2.

REMOVAL OF PROPERTY. See *Chattel Mortgage* 1.

RENTS. See *Constitutional Law* 2; *Landlord and Tenant*; *Sale of Realty* 1.

RES ADJUDICATA.

1. Where lines on land have been ascertained by commissioner's report and decree, and the land sold by special commissioner for more than sufficient sum to pay all such liens, sale confirmed, purchase money all paid, and a decree entered declaring that all such liens were "fully satisfied and discharged," such decree is *res adjudicata* as to holders of such liens who were parties to the suit. *Mann v. Peck*, 18.
2. When a decree is entered reserving the right to any party to further litigate any matter in controversy in the suit, such reservation may be reviewed on appeal by any party prejudiced thereby, and if no appeal is taken, such reservation becomes *res adjudicata*, and cannot be called in question by any party in any other suit or proceeding. *Bodkin v. Arnold*, 90.
3. A bill in equity dismissed generally, without any reservation to the plaintiff to sue thereafter, is conclusive between the parties, and those claiming under them, of all the issues made up in the cause, even though there was no jurisdiction in equity because of adequate remedy at law. *Watson v. Watson*, 290.
4. If a party would be entitled to the benefit of a decree as *res judicata* to the prejudice of another afterwards make an admission of record in the case, inconsistent therewith, detracting from his right under said decree, and such admission is the truth, he cannot rely on such decree as *res judicata*. *Crumlish's Adm'r. v. S. V. R. Co.*, 567.

RESULTING TRUST.

1. To raise a resulting trust for one paying purchase money for land when title is taken in the name of another, the trust must arise from equity principles, at the moment title passes, and no subsequent payment will create it; nor will a subsequent agreement by the party holding title to hold in trust raise such trust. *Harris v. Elliott*, 245.
2. A resulting trust will not arise in favor of one paying for land conveyed to another, if that other be wife or son or other person as to whom the one paying voluntarily places himself in *loco parentis* in the transaction. A resulting trust will not arise in favor of one paying for land conveyed to another where such payment is only a loan to such other person. *Id.* 246.
3. Where it appears clearly that, in paying for land by one with conveyance to another, the party paying intended to make a gift or confer a benefit, no resulting trust arises in his favor. To warrant subrogation in favor of one paying a debt as surety or otherwise, the debt paid must have been a lien on the land. *Id.* 246.

RETURN.

Before hearing a case, matter, or proceeding removed by *certiorari* from an inferior tribunal the circuit court should require a formal legal return thereto to be made by the officers to whom the same is directed, unless such return is waived by the parties to such case, matter or proceeding. *Cushwa v. Lamar*, 327.
See *Distress Warrant*; *Foreign Corporations*.

REVERSAL. See *Commissioner in Chancery* 3; *Evidence* 2; *Judgment* 2; *Sale of Realty* 2.

REVIEW ON APPEAL.

Issues not determined by the circuit court will not be considered by this Court on appeal. *Woods v. Campbell*, 203.
See *Commissioner in Chancery* 1; *New Trial* 3; *Res Adjudicata* 2; *Record* 1.

RIGHT OF ACTION.

A provision in one of the conditions indorsed on the certificates of stock issued by such corporation that any action brought against the association by the shareholders shall be brought in the county of Ontario, N. Y., is a void requirement, as jurisdiction cannot be taken away by consent. *Savage v. People's B. L. & S. Ass'n*, 275.

RIGHT OF WAY. See *Injunction*; *Railroads* 1, 2.

RIGHTS OF CREDITORS. See *Fraudulent Conveyance* 1.

RIGHTS OF GRANTEE. See *Fraudulent Conveyance* 1.

RIGHTS OF STRANGER. See *Statute of Limitations* 4.

RIPARIAN LANDS.

Where a party to a deed agrees to pay to the other party the sum of seventy-five dollars per annum for keeping up a certain dam, necessary to the mill property of the obligor, and that the obligation to pay the same, in addition to being a personal one, "shall be a covenant running with the land, and binding upon the Roncevert Flour Mills, race, and water power, into whosoever hands they may pass," he thereby creates a lien on such mill property, which, duly recorded, has priority over subsequent liens. *Hurxthal's Ex. v. Hurxthal's Heirs*, 584.

RULE. See *Mandamus* 2.

SALES. See *Trusts*.

SALE OF REALTY.

1. Before a sale of land can be made to satisfy judgments, it must somehow appear in the cause that it will not, in five years, rent

SALE OF REALTY—Continued.

for enough to satisfy the liens decreed. *Dunfee v. Childs*, 156.

2. The reversal of a decree under which land is sold will not affect the title of the purchaser, if he is not a party to the suit, or, though a party, has no interest in the debt or cause for which the land is sold; but, if he is a party with such interest in the decree, his title falls with such reversal. If a decree confirming a sale be reversed for error in it, the purchaser's title falls, whether he be a party or not. Where necessary parties having title are not before the court, the purchaser's title falls with reversal of decree of sale. *Id.*

See *Contracts* 5, 6; *Specific Performance*; *Statute of Frauds* 2; *Vendor and Vendee* 1, 2, 3.

SECURITY. See *Implied Trust* 2.

SENTENCE. See *Burglary* 2.

SERVICE OF PROCESS.

"Service accepted September 6, 1897. Alf. Paul," is a bad acceptance. *Adkins v. Globe Fire Ins. Co.*, 384.

See *Foreign Corporations*; *Process* 1, 2.

SET-OFF. See *Deputy Sheriff* 2; *Forthcoming Bond*; *Taxation* 1.

SETTING ASIDE SALES. See *Fraud* 1.

SHERIFF. See *Contracts* 1; *Deputy Sheriff* 1, 3; *Executors* 3; *Equity* 1; *Forthcoming Bond*; *Subrogation*; *Taxation* 1.

SHERIFF AND EXECUTOR. See *Executors* 3.

SIGNING. See *Bill of Exceptions* 1.

SOUND DISCRETION. See *Appeal* 2.

SPECIFIC PERFORMANCE.

The evidence must be clear, full, and free from suspicion to enable a court of equity to enforce an oral contract for the sale of land. *Harris v. Elliott*, 245.

STALE DEMAND. See *Bill in Equity*; *Presumption of Payment*.

STATUTES.

In construing a statute which revises a former one, and the meaning of the former one was settled either by clear expressions in it or by adjudication upon it, mere change of phraseology will not be construed to be change of the law, unless it evidently purports an intention in the legislature to work a change. *Brown v. County Court*, 828.

STATUTE OF FRAUDS.

1. The statute of frauds does not apply, under the circumstances of this case, to defeat the claim of the defendant for his services. *Davis v. Baker*, 456.
2. Where a sale of real estate is made by a trustee, and no memorandum is made in writing by the trustees, such sale is void under the statute of frauds. *Ralphsnyder v. Shaw*, 680.
See *Contracts* 2.

STATUTE OF LIMITATIONS.

1. If an employer promises to make compensation for services at the time of his death, by will or otherwise, the statute of limitations does not begin to run until the death of such person. *Cann v. Cann's Heirs*, 563.
2. Where a suit in equity is brought by a judgment creditor to subject the lands of the debtor to the satisfaction of his judgment, and the plaintiff in the bill sets forth the fact that there is another judgment against the same defendant older in point time, but which has not been kept alive by issuing executions as required by statute, but the defendant is in life, and does not plead the statute of limitations as to said older judgment, the plaintiff in said suit in equity has no right to file or rely on such plea. *Wellton v. Boggs*, 620.
3. The plea of the statute of limitations is, in general, a personal defense, to be made by the party against whom the demand is asserted. *Id.*
4. A mere stranger to the claim, as a creditor, although he may be injuriously affected by his debtor's failure to set up the statute, cannot either set it up himself, or compel his debtor to do so, as in such case the privilege is personal. *Id.* 621.
See *Administrators* 2; *Bill of Review* 4; *Co-Tenancy* 3; *Decree* 2; *Laches* 3.

STOCK. See *Corporations* 2.

STOCKHOLDERS. See *Corporations* 9, 11.

STOCK CERTIFICATES. See *Building and Loan Association* 5; *Right of Action*.

SUBROGATION.

Sureties on the official bond of a sheriff, upon being compelled to make good the default of their principal, will, by the fact of payment, become equitable assignees, and be subrogated to the position of the State in respect of all its securities, liens, and priorities, for the purpose of enforcing reimbursements from their principal. *Myers v. Miller*, 595.
See *Resulting Trust* 3.

SUBSEQUENT ACTS. See *Deed* 7.

SUFFICIENCY OF TENDER. See *Tender* 1.

SUITS AGAINST OFFICERS. See *Corporations* 10.

SUIT IN EQUITY. See *Statute of Limitations* 2.

SUIT PENDING. See *Fraudulent Conveyance* 6.

SUIT TO CHARGE LAND.

In a suit to charge land in the hands of a fraudulent purchaser with money, he yet holding the land, that must be subjected; and there cannot be a personal decree against him for the money, though there may be for costs, if the land does not pay the money and costs. If he has sold, he may be charged with the proceeds. *Harris v. Elliott*, 246.

SUIT TO WIND UP. See *Corporations* 11.

SUPREME COURT OF APPEALS.

1. This Court has appellate jurisdiction in all cases of *certiorari* awarded by the circuit court in review of matters and proceedings pending before or determined by a municipal council. *Cushwa v. Lamar*, 326.
2. Where a decree merely pecuniary, and for not over one hundred dollars, is reversed on bill of review or petition for rehearing, this Court has no jurisdiction of an appeal from the decree of reversal. *Deaton v. Mitchell*, 670.

SUPREME COURT OF UNITED STATES. See *Due Process of Law* 2.

SURETIES. See *Subrogation*.

SURETYSHIP.

1. If a creditor surrender a lien or hold upon property of a principal debtor, which constitutes a substantial security for the debt, in part or whole, without consent of a surety, the surety is, in equity, discharged from the debt, in part or whole, according to the value of the property; but if the principal had really no title to the property, and it cannot be said to have a real value applicable to the debt, and the surety is not injured by the surrender, the surety is not discharged. *First National Bank v. Parsons*, 688.
2. Mere indulgence of a principal debtor by a creditor, without a binding contract for such indulgence, based on valuable consideration, will not discharge a surety. *Id.* 689.
3. Mere continuance at a term of court of a suit against a principal debtor by consent of the creditor, not under any valid contract to continue, will not discharge a surety. *Id.* 689.

SURETYSHIP—Continued.

4. The principle on which an agreement for an extension of time discharges a surety is that the creditor thus deprives the surety of means of relieving himself by paying the debt and proceeding immediately against the principal, or, without paying, by filing his bill *quia timet* to make the surety pay, or by notice to the creditor under the statute. The surety is not discharged by an act which in no manner affected his right or impaired the remedies of the creditor. *Id.* 689.

SURRENDER OF LEASE. See *Lease* 1, 2.

SURRENDER OF NOTES. See *Mechanic's Lien* 3.

SURRENDER OF PROPERTY. See *Suretyship* 1.

TAXATION.

1. A taxpayer cannot set off the sheriff's individual indebtedness to him, even though the sheriff has settled with the State treasury for such taxes. *Miller v. Wisner*, 59.
2. Under the act 1869, and under section 6, Article XIII of the Constitution, forfeiting land for nonentry on the tax books, where a tract lies partly in one county and partly in another, entry in the county wherein the greater part lies saves the whole tract from forfeiture. Entry in either county would likewise save it. *State v. Cheney*, 478.
3. Where a patent is for a tract of land of a given number of acres, and it is entered for taxes accordingly, the fact that the tract contains a greater quantity will not forfeit the whole or the excess for nonentry for taxation, under chapter 125, Acts 1869, or section 6, Article XIII. of the Constitution. *Id.*
4. Acts 1869, chapter 125, and section 6, Article XIII. of the State Constitution, forfeiting land for nonentry for taxation, are not repugnant to amendment 14 of the Constitution of the United States. *Id.* 479.
5. The prospective production of oil from such well cannot be properly charged to the lessee, on the personal property books of the county. *Carter v. Tyler County Court*, 806.
6. Under chapter 29 of the Code, which provides for the assessment of taxes, the words "personal property," as therein used, shall include all fixtures attached to the land, if not included in the valuation of such land entered in the proper land book. *Id.*
See *Constitutional Law* 3; *Contracts* 1; *Due Process of Law* 1; *Municipal Corporations* 6.

TAX SALES.

1. A sale of land for taxes is without warranty by the State, and it is not prevented thereby from setting up its right under forfeiture for omission to enter the land for taxes either before or after the tax sale. *State v. Sponaugle*, 416.

TAX SALES—Continued,

2. If a sale for taxes is made and the tax purchaser pays taxes thereafter, the receipt of such taxes will not operate, on the theory of estoppel *in pais* by conduct, to prevent the State from setting up against the tax purchaser a title to land, by forfeiture, for failure of the former owner to enter it for taxation subsequent to or before the tax sale. If the tax title be valid, it would prevent such forfeiture for taxes after the tax sale from its own force, not on the theory of estoppel. *Id.*
3. A sale of land for taxes, valid to pass title of the owner, will prevent its forfeiture for failure to enter it for taxes in the name of the former owner for years subsequent to the tax sale. *Id.*
4. An omission, in a list of sales of land for taxes, to state the estate of the owner, will not annul the tax deed. *Id.*
See *Co-Tenancy* 1; *Laches* 2.

TAX TITLE. See *Co-Tenancy* 1.

TENANCY.

A purchase of the reversion in fee by a tenant for years ends the tenancy, and the tenant is not thereafter estopped from denying further continuing title or rent in the landlord. *Wade v. South Penn Oil Co.*, 381.

TENANCY FOR LIFE.

1. After the expiration of a life tenancy in a town lot by death, and the termination of a lease thereunder, the lessee cannot remove buildings put on such lot during the continuance of such tenancy. Such buildings become a part of the realty, and go to the person entitled to the remainder. *Jones v. Shufflin*, 729.
2. All unexpired leases given by a life tenant on town lots used for building purposes alone terminate with the death of such life tenant, and do not continue in force until the end of the current year. *Shufflin v. House*, 732.
See *Tenancy*.

TENDER.

1. While in a tender an actual visible production of money is dispensed with where the party denies all right to pay any sum, yet it must appear there was an actual offer to pay, and that the tenderer had the money, and was about to produce it, and would have done so if he had not been prevented by such denial of right to pay. *Shank v. Groff*, 543.
2. Tender, to stop interest, must be of an exact amount, and must be kept good and ready at all times to be paid to the creditor on demand, which must be shown by the tenderer. *Id.*
3. One making a tender, and then using the money, and afterwards failing to pay the money into court, with a pleading relying upon such tender, loses its benefit, and will not be released from interest by it. *Id.*
See *Mortgage* 1

TEST OF ADMISSIBILITY. See *Witness* 2.

TITLE.

A party who files a bill to remove a cloud from his title to a tract of land, who shows on the face of his bill that he has no title to the land himself, and no right to interfere with others who appear to have good title thereto, is not entitled to be heard in a court of equity, and his bill will be dismissed. *Harr v. Shaffer*, 709. See *Eminent Domain*; *Injunction*; *Oil Lease* 1, 3; *Railroads* 2; *Resulting Trust* 1; *Unlawful Entry and Detainer* 1, 2; *Vendor and Vendee* 4.

TOWN LOTS. See *Land*.

TRANSACTIONS WITH DECEDENT. See *Witness* 1, 2.

TRESPASSER. See *Negligence* 1.

TRIAL See *Criminal Law* 1; *Remarks of Judge*.

TRUSTEE. See *Contracts* 5; *Corporations* 6; *Statute of Frauds*, 2.

TRUSTS.

While it is true that a trustee or agent cannot be interested in a sale made by himself, yet when he has fully discharged his trust, and sold property to a third person in good faith, having no interest in the same at the time, he may afterwards acquire the title from the purchaser; and such fact will not afford ground for avoiding the sale. *Board of Trustees v. Blair*, 813. See *Co-Tenancy* 1; *Deed* 1.

UNLAWFUL ENTRY AND DETAINER.

1. On the trial of a warrant issued by a justice in unlawful detainer, if answer of title is filed by the defendant setting forth therein the facts showing that such title will come in question on the trial thereof, which answer shall be properly verified by his affidavit or that of his agent or attorney, if the justice be of opinion that the facts therein stated show that the title to real property will so come in question he shall dismiss the action at the costs of the plaintiff, unless the plaintiff or his agent or attorney shall file an affidavit denying the truth of such facts. *Watson v. Watson*, 290.
2. If an appeal to be taken from the judgment of a justice in such case to the circuit court, and if there appears by answer filed that the title to the property will come in question, it will be the duty of the court to dismiss the action. *Id.*

UNRECORDED DEED.

An unrecorded deed is void as to creditors, whether they have notice or not, but it will be good against purchasers with notice, or who have not purchased for valuable consideration. *Abney v. Ohio L. & M. Co.*, 446.

USURY. See *Building and Loan Association* 3.

VACATING JUDGMENT. See *Justice of the Peace* 2.

VALIDITY OF BY-LAWS. See *Corporations* 5.

VALIDITY OF JUDGMENT. See *Judgment* 3, 4.

VENDOR AND VENDEE.

1. Where a party, by an agreement in writing, contracts to sell a tract of land, describing it by a general local description, and as being the same land conveyed to him by a third party, the vendee has a right to look to the record for a description of the land; and if it there appears that the land is described by metes and bounds, and containing a certain number of acres, such vendor will be regarded as representing the land to contain the number of acres mentioned in said recorded deed. *Bogg's Ex'r. v. Harper's Adm'r.*, 554.
2. Where a party, by written agreement, sells a tract of land at a specified price, upon an unqualified statement that it contains a definite quantity or specified number of acres, it will be held *prima facie* that the vendee was influenced to pay or agree to pay the price specified because of such statement; and if it is afterwards established that there is a deficiency in the quantity, in excess of what may be rightfully attributed to the usual inaccuracies in surveying, the vendor, in the absence of all other proof, will be presumed to have committed a fraud on the rights of the vendee by such statement of the quantity, and a court of equity will for this reason grant relief to vendee for such deficiency. *Id.* 555.
3. The general rule in such cases is that the compensation allowed for the deficiency in quantity shall be at the rate of the average price paid or agreed to be paid for the entire tract purchased. *Id.* 555.
4. A purchaser who has accepted a deed of general warranty must generally pay the purchase money, and look to the warranty for indemnity against bad title; but if the grantor is insolvent, or the warranty not binding, he will not be compelled to pay, if the title is defective, though he has not yet lost from its defects. *Bennett v. Pierce*, 654.
See *Unrecorded Deed*.

VENDOR'S LIEN.

1. The holder of a vendor's lien joins with the owner of the land charged with such lien in a deed of trust granting the land by the words, "grant, bargain, sell, and confirm," to a trustee in trust to secure a debt to a third party, and to pay the balance of proceeds of sale under it to the owner of the land owning the vendor's lien. Such deed of trust will discharge the vendor's lien

VENDOR'S LIEN—Continued.

as to both the debt secured by the deed of trust and the owner of the land. Such deed of trust is as to the owner of the land a grant, and as to the holder of the lien a confirmation. *Turk v. Skiles*, 82.

2. Such deed of trust, containing no words of limitation, operates, under section 8, chapter 71, Code, and section 1, chapter 72, *Id.*, to pass the whole estate or interest of the grantors in the land, including such lien, for the purpose specified in the deed of trust. *Id.*

VERDICT.

1. An instruction in the following language: "If the jury believe from the evidence that the plaintiff is entitled to recover a greater sum than \$280, then their verdict should be: (1) We, the jury, find for the plaintiff, and assess his damages at \$——. Otherwise, their verdict should be: (2) We, the jury, find for the defendant,"—must be construed to mean that the verdict of the jury should be for such greater sum, inclusive of the sum of two hundred and eighty dollars, and not for the excess of such greater sum after deducting therefrom such sum of two hundred and eighty dollars, *Alexander v. Marling*, 208.
2. When, upon the facts conceded as shown, a verdict for the plaintiff would be against law, the court should, on motion, exclude the plaintiff's evidence, and direct a verdict for the defendant. So it is also where, if the essential facts claimed to be proven by the evidence were proven, a verdict for the plaintiff would be justified by the law, yet the evidence does not appreciably tend to prove them, but so plainly fails to do so that two reasonable men should not differ as to its insufficiency. *Ritz v. City of Wheeling*, 262.
3. Jurors will not be heard to impeach their verdict, except in few instances. They are heard more readily to sustain their verdict. *Graham v. Citizens Nat Bank*, 701.
4. "We, the jury, agree and find the defendant, Virgil Staley, not guilty of murder in the first or second degree, as charged in the within indictment, but do agree and find the defendant, Virgil Staley, guilty of voluntary manslaughter,"—is a verdict sufficient in form. *State v. Staley*, 792.
See New Trial 4.

VESTED REMAINDER. *See Deed* 4.

VESTED RIGHTS. *See Corporations* 5.

VIOLATION OF ORDINANCE. *See Municipal Corporations* 1, 2.

WAIVER. *See Insurance* 3; *Return*.

WARRANTY. *See Tax Sales* 1.

WIFE'S SEPARATE ESTATE. See *Deed* 8, 9; *Married Women* 1, 2.

WILLS.

1. Where a will directs land to be sold and divided among legatees, it is, in equity, a conversion of land into money. *Brown v Miller's Exr's.*, 211.
2. The beneficiaries may generally prevent actual conversion by sale, and take the land; but all those entitled must unite in such election. One cannot force an election upon others. *Id.* See *Deed* 2, 3.

WITHDRAWAL. See *Building and Loan Association* 5.

WITNESS.

1. In a suit growing out of said contract, after the decease of G, the testimony of F. is competent to prove materials furnished for, and labor and work done on, the building, under the exception in section 23, chapter 130 of the Code, providing that no party to any action, suit, or proceeding shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, etc. *Fouse v. Gilfillan*, 214.
2. In such a case the test of the admissibility of the testimony is, does it tend to prove what the transaction was? *Id.* See *Evidence* 7, 8.

WRIT OF ERROR. See *Equity* 9.

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